YOUTH JUSTICE COURT OF NOVA SCOTIA
Citation: *R. v. U.H.C.* , 2015 NSPC 10

Date: 2015-03-04
Docket: 2668100
Registry: Pictou

Between:

Her Majesty the Queen

v.

U.H.C.

VERDICT

Restriction on Publication: Any information that could identify the complainant shall not be published in any document or broadcast or transmitted in any way.
No person shall publish the name of U.H.C. or any other information if it would identify the young person as a young person dealt with under the Youth Criminal Justice Act

Judge:	The Honourable Judge Del W. Atwood
Heard:	1October 2014, 29 January 2015, in Pictou, Nova Scotia
Charge:	Section 271 of the Criminal Code of Canada
Counsel:	William Gorman for the Nova Scotia Public Prosecution Service Stephen Robertson, Nova Scotia Legal Aid for U.H.C.

By the Court:

[1] The facts of this case are relatively uncomplicated. U.H.C. and A.V. made contact over Facebook. One day they met, face to face. They and some friends got a liquor Samaritan to buy them some wine. A.V. drank too much, and was ill. U.H.C. took A.V. to a friend's home where they spent the night. The next day, they had unprotected sexual intercourse on one occasion. U.H.C. was sixteen years old at the time; A.V. was twelve. A.V.'s mother eventually found out what had happened; as a responsible parent, she quickly sought medical treatment for her daughter, and the police were called. U.H.C. was charged with sexually assaulting A.V. The prosecution proceeded indictably. U.H.C. pleaded not guilty. All of these facts are admitted and acknowledged as true by U.H.C.; however, he asserts that, at the time he had sexual contact with A.V., he thought mistakenly that she was fourteen.

[2] For the reasons that follow, I find U.H.C. guilty as charged.

[3] It is clear that A.V. was willing to have sexual intercourse with U.H.C. This is because U.H.C. asked A.V. and she responded with words signifying assent. However, as she was only twelve years old at the time, she was unable to give consent legally. This is because of section 150.1 of the *Criminal Code*. It is

necessary to reproduce the entire section, as it is implicated extensively in this case.

> Sexual Offences
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> Consent no defence
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> 150.1 (1) Subject to subsections (2) to (2.2), when an accused is charged with an offence under section 151 or 152 or subsection 153(1), 160(3) or 173(2) or is charged with an offence under section 271, 272 or 273 in respect of a complainant under the age of 16 years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge.
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> Exception — complainant aged 12 or 13
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> (2) When an accused is charged with an offence under section 151 or 152, subsection 173(2) or section 271 in respect of a complainant who is 12 years of age or more but under the age of 14 years, it is a defence that the complainant consented to the activity that forms the subject-matter of the charge if the accused
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> (a) is less than two years older than the complainant; and
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> (b) is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitative of the complainant.
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> Exception — complainant aged 14 or 15
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> (2.1) When an accused is charged with an offence under section 151 or 152, subsection 173(2) or section 271 in respect of a complainant who is 14 years of age or more but under the age of 16 years, it is a defence that the complainant consented to the activity that forms the subject-matter of the charge if
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> (a) the accused

(i) is less than five years older than the complainant; and

(ii) is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitative of the complainant; or

(b) the accused is married to the complainant.

Exception for transitional purposes

(2.2) When the accused referred to in subsection (2.1) is five or more years older than the complainant, it is a defence that the complainant consented to the activity that forms the subject-matter of the charge if, on the day on which this subsection comes into force,

(a) the accused is the common-law partner of the complainant, or has been cohabiting with the complainant in a conjugal relationship for a period of less than one year and they have had or are expecting to have a child as a result of the relationship; and

(b) the accused is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitative of the complainant.

Exemption for accused aged twelve or thirteen

(3) No person aged twelve or thirteen years shall be tried for an offence under section 151 or 152 or subsection 173(2) unless the person is in a position of trust or authority towards the complainant, is a person with whom the complainant is in a relationship of dependency or is in a relationship with the complainant that is exploitative of the complainant.

> Mistake of age
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> (4) It is not a defence to a charge under section 151 or 152, subsection 160(3) or 173(2), or section 271, 272 or 273 that the accused believed that the complainant was 16 years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant.
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> Idem
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> (5) It is not a defence to a charge under section 153, 159, 170, 171 or 172 or subsections 212(2) or (4) that the accused believed that the complainant was eighteen years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant.
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> Mistake of age
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> (6) An accused cannot raise a mistaken belief in the age of the complainant in order to invoke a defence under subsection (2) or (2.1) unless the accused took all reasonable steps to ascertain the age of the complainant.[1]

[4] A plain-meaning reading of this provision would seem to be clear. A person is capable of giving consent to sexual activity once that person has attained her or his sixteenth anniversary. Sixteen. Not fifteen. Not fourteen. Not thirteen. Sixteen. Anyone who engages in sexual activity with someone younger than sixteen is, subject to certain exceptions, committing a crime.

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[1] R.S., 1985, c. 19 (3rd Supp.), s. 1; 2005, c. 32, s. 2; 2008, c. 6, ss. 13, 54. After U.H.C. was charged, this section was amended by S.C. 2014, c. 25, s. 4, assented to 6 November 2014, in force thirty days thereafter in virtue of s. 49. The amendments are not consequential to this case.

[5] I raise the point about exceptions, not to detract in any way from a law that is intended to protect young people from exploitation, but merely to observe that the criminal law imposes control with restraint that is appropriate to the government of fallible human beings.

[6] People make mistakes. Mistakes about the law are generally inexcusable. Section 19 of the *Criminal Code* says so. But a mistaken belief in a fact is different. This is because a mistaken belief about the state of things may negative the knowledge component of the mental element of a crime. In that sense, mistake of fact is not so much a defence as it is a potential obstacle to the ability of the prosecution to prove an essential element of a crime beyond a reasonable doubt. Triable issues pertaining to knowledge can, I suppose, arise in two ways. First: take for example the offence of unauthorized possession of a firearm in a motor vehicle under section 94 of the *Criminal Code*; an occupant of a vehicle in which a firearm was being illegally transported could profess complete lack of knowledge that anyone had a gun on board. Second: consider the same charge against the same vehicle occupant; only this time, the accused admits he saw something that resembled a firearm, but thought it was a toy or some other harmless replica.

Accordingly, a trier might be faced with an accused who professes complete lack of knowledge, or partial, but mistaken knowledge.[2]

[7] Section 150.1 accommodates the accused who is labouring under a mistake as to the age of a sexual partner. But the extent of that accommodation has been subject to differing interpretations.

[8] Consider the facts of this case. U.H.C. and A.V. had sexual intercourse. U.H.C. was sixteen; A.V. was twelve, but U.H.V. professes he thought her to be fourteen. Recall that sub-s. 150.1(2) states:

> (2) When an accused is charged with an offence under section 151 or 152, subsection 173(2) or section 271 in respect of a complainant who is 12 years of age or more but under the age of 14 years, it is a defence that the complainant consented to the activity that forms the subject-matter of the charge if the accused
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> (a) is less than two years older than the complainant; and
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> (b) is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitative of the complainant.

[9] Similarly, sub-s. 150.1(2.1) provides that:

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[2] I am cautious in using section 94 to build an example, as that section lists a number of mistake-related defences (and I use the term 'defence' in a strictly legal sense, as the statute would appear to require an accused to establish the existence of reasonable grounds for the belief), none of which includes total lack of knowledge, or mistaken knowledge as to whether what resembled a firearm was a replica or real.

> (2.1) When an accused is charged with an offence under section 151 or 152, subsection 173(2) or section 271 in respect of a complainant who is 14 years of age or more but under the age of 16 years, it is a defence that the complainant consented to the activity that forms the subject-matter of the charge if
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> (a) the accused
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> (i) is less than five years older than the complainant; and
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> (ii) is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitative of the complainant; or
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> (b) the accused is married to the complainant.

[10] Viewed in isolation, it would seem that these provisions have the effect of decriminalizing consensual sexual activity with young persons between 12 and 15 years of age, provided the age-differential limits are satisfied, and there exist no elements of trust, dependency or exploitation.

[11] Again, viewed in isolation, sub-ss. 150.1(2) and (2.1) would not appear to create mistake-of-fact defences, but serve instead to excuse close-in-age sexual activity that is not explotive.

[12] However, a provision in a statute must be given a contextual interpretation. Certainly, a criminal law in particular ought not be drawn so vaguely so that the meaning of one offence-creating provision might be interpreted only by discreet—

or discrete—reasoning based on other, unconnected provisions.[3] Yet, legal context admits of reference to closely connected provisions in trying to figure out what a statute means.[4] This serves to ensure that related provisions of a statute remain coherent and congruous.[5]

[13] The current wording of sub-ss. 150.1(2), (2.1) and (6) of the Code was enacted as part of the *Tackling Violent Crime Act*.[6] It is sub-s. 150.1(2) that is pertinent to this case. Prior to the *TVCA*, sub-s. 150.1(2) read this way:

> (2) Notwithstanding subsection (1), where an accused is charged with an offence under section 151 or 152, subsection 173(2) or section 271 in respect of a complainant who is twelve years of age or more but under the age of fourteen years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge unless the accused
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> (a) is twelve years of age or more but under the age of sixteen years;
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> (b) is less than two years older than the complainant; and
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> (c) is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitative of the complainant.

The *TVCA* added sub-s. 150.1 (6) to complement sub-s. 150.1(4) in limiting the scope of mistake of fact by requiring a person asserting a mistake to have exercised due diligence. In my view, they operate as important interpretive aids in

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[3] Glanville Williams, *Criminal Law: The General Part*, 2d ed. (London: Stevens & Sons Ltd.: 1961) at 240.
[4] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014) at paras. 1.15, 13.3-13.4.
[5] *Id*., at para. 11.73.
[6] S.C. 2008, c. 6, in force 1 May 2008 in virtue of SI/2008-34 ; *supra*, note 1.

understanding the nature of the excuse created in sub-s. 150.1(2). Here they are again:

Mistake of age (4) It is not a defence to a charge under section 151 or 152, subsection 160(3) or 173(2), or section 271, 272 or 273 *that the accused believed that the complainant was 16 years of age or more* at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant [Emphasis added].	Mistake of age (6) An accused cannot raise a mistaken belief in the age of the complainant *in order to invoke a defence under subsection (2) or (2.1)* unless the accused took all reasonable steps to ascertain the age of the complainant [Emphasis added].

[14] It is interesting to note that, in the French-language version of these provisions, the marginal notes read: « *Inadmissibilité de l'erreur* ». *Inadmissibilité* is defined in *Le Petit Robert* as « *caractère de ce qui est inadmissible* ». *Inadmissible* in turn, is defined as « *Qu'il est impossible d'admettre, de recevoir.* » After having reviewed the entirety of the language of s. 150.1, and applying the limited weight to be assigned to marginal notes to the context of these two

subsections,[7] I believe that the purpose of section 150.1 is to limit strictly the resort to mistaken belief in age in the following manner. First, sub-s. 150.1(6) makes clear that sub-ss. 150.1(2) and (2.1) may be invoked *only* as a part of a defence of mistake of age, so that mistake will be inadmissible unless the actual close-in-age criteria of sub-ss. 150(2) and (2.1) are met; furthermore, sub-s. 150.1(4) makes clear that the only mistake that will be admissible *in any case* is a belief that the complainant was at least 16 years of age. Accordingly, for a 16 year old accused to come into court and admit to sexual activity with a 12 year old, but seek to excuse it by asserting a belief that the complainant was 14 would amount to a mistake of law. At least this is how I interpret the statute. Indeed, it was the interpretation favoured by my colleague Derrick J.P.C. in her analytically superlative decision in *R. v. J.T.C.*[8] In my view, there are plenty of good policy reasons supporting this interpretation. First, fixing the age of consent at sixteen, period, leaves no wiggle room for ambiguity, doubt, or, indeed, opportunism, particularly important when trying to regulate the conduct of adolescents or young adults; second, mistaken belief in age should be admissible only in close-in-age situations, in order to protect vulnerable young people from wily and experienced adult predators.

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[7] See note 4, supra, at paras. 14.59-14.63
[8] 2013 NSPC 88 at para. 106.

[15] But as compelling as I feel this interpretation might be, it is not the one that was applied authoritatively in *R. v. Ross*.[9] In that case, it was the opinion of Bryson J.A. that a mistaken belief that a complainant is fourteen can ground a defence if all reasonable steps have been taken to ascertain age. This is the interpretation that this court must apply.[10]

[16] And so, as was done by my colleague in *J.T.C.*, I must determine whether the prosecution has proven beyond a reasonable doubt that U.H.C. failed to take all reasonable steps to ascertain A.V.'s age. That the burden rests with the prosecution was explained by the British Columbia Court of Appeal in *R. v. Westman*.[11] This is a constitutionally fundamental principle, founded as it is on the basic law that the burden of proof in a criminal case rests entirely with the prosecution to prove each element of an offence—including all explicit and

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[9] 2012 NSCA 56 at para. 13.

[10] It would, of course, be possible to burrow through *Hansard* to try to figure out the meaning intended by Parliament. However often that is done by courts, it seems to me to be a strained method of statutory interpretation. Reference to ministerial statements on second reading seems to overlook the fact that a statute is an expression of the will of Parliament, not just that of the member of the executive who might have moved the bill. Furthermore, if reliance is to be placed on statements made by members of the executive branch during the debate stage, there would seem to be no principled reason for not considering statements as to original intent made after a bill has been signed into law. And so why not ministerial proclamation statements, much as with presidential signing statements in America, in which the president declares how a law will be interpreted and applied by the executive branch. Surely we want none of this. If the meaning of a statute cannot be settled conclusively through reference to its text—an interpretive exercise to be done by courts when the implication of a statute is controversial—then let the legislature amend the text and try to get it right on the next go 'round, rather than, as Professor Glanville Williams once put it, digging through the legislative rubbish-heap to try to exhume a meaning.

[11] 65 B.C.A.C. 285 at paras. 15-20.

implicit mental elements—beyond a reasonable doubt. An accused does not bear any legal burden to prove his innocence.

[17] I find that the prosecution has proven beyond a reasonable doubt that U.H.C. failed to take all reasonable steps to ascertain A.V.'s age. In fact, I am satisfied beyond a reasonable doubt that he took no steps. U.H.C.'s main concern when he had sexual intercourse with A.V. was not "how old" but "how soon".

[18] First off, by her appearance in court, A.V. looked very much her very young age, which was thirteen at the time of trial. I believe A.V.'s evidence that she told U.H.C. that she was only twelve years old. She had no reason to lie to him. She did not meet up with U.H.C. to have sex with him, and did not demonstrate to me the sort of guile and capacity to manipulate the facts to fit the law that would be required to allow her to contrive seemingly licit sex with U.H.C.

[19] I consider it important as well that it was not A.V., but, rather, her mother who took steps to have her daughter treated medically; A.V.'s mother testified that she had to pull information out of her daughter as A.V. didn't want to give up anything.

[20] I found A.V.'s candor as a witness outstanding. She did not try to exaggerate what had happened to her; she acknowledged readily her level of

participation in the drinking activity the night before; finally, she affirmed that, after U.H.C. had coaxed and encouraged her, she agreed to having sexual intercourse with him. She admitted readily to having lied to U.H.C. about being pregnant; her motivation for doing so was completely understandable: U.H.C. had talked her into having sexual contact; she thought he wanted a relationship; he saw it as a throw-away moment and told her as much; she was hurt, and reacted emotionally. A far cry from the suggestion that she would contrive a story revolving around a very fine legal point in order to put U.H.C. in legal jeopardy.

[21] I also believe the evidence of U.H.C.'s lifelong friend, D.M., that he broke the news to U.H.V. that A.V. might be only thirteen. I am satisfied that U.H.C. spoke to D.M. a short time later and told D.M. that he had told A.V. he couldn't hang out with her anymore because she was too young.

[22] I acknowledge that both D.M. and M.M. (a defence witness who is an adult acquaintance of U.H.C.'s) testified that A.V. had told them she was fourteen.

[23] I believe that D.M. was confused on that point, as he testified initially that neither he nor U.H.C. had any knowledge of her age, other than during their nighttime conversation when they discussed the perils of having a drunk underage girl in the house. Certainly, D.M. cannot impute knowledge to U.H.C.—or at least

I cannot allow it in making my findings of fact; the inference I draw from D.M.'s evidence is that no one talked about A.V.'s age when U.H.C. was in his presence. I also infer from this the facts that U.H.C. knew most certainly that A.V. was too young to be drinking, which ought to have raised many red flags.

[24] With respect to M.M.'s evidence, I accept that she is a friend of U.H.C. who came to court to offer helpful testimony. While I do not believe that she intended to mislead the court, I simply cannot accept that she conducts herself as a member of the morality police, grilling young people who arrive at her home about their ages, just in case something—who knows what—might happen. Even if she did ask A.V. her age, the response would not have been memorable.

[25] U.H.C.'s evidence was remarkable in its profession of avoidance of any responsibility whatsoever. According to U.H.C., everything was A.V.'s idea: her idea to befriend each other on Facebook, her idea to meet up, her idea to get the liquor for the drinking binge the night before on the jitney trail, and, ultimately, her idea to have sex. In my view it is the last assertion in particular that puts the lie to his testimony that he asked A.V. about her age and that he was satisfied she was fourteen: if it wasn't his idea to have sex, if it hadn't even entered his mind, why would he feel the need to inquire of her about about her age? As I stated earlier,

his questions were not "how old" but "how soon". I found U.H.C.'s evidence largely incredible and implausible.

[26] I find that the prosecution has proven beyond a reasonable doubt that U.H.C. took no steps to ascertain A.V.'s age.

[27] All of the essential elements of the charge having been proven beyond a reasonable doubt, I shall make a s. 36 *Youth Criminal Justice Act* finding of guilt as charged.

J.P.C.