

IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. R.H.B.*, 2003 NSPC 44

Date: 20030909
Case No.(s): 1063551
Registry: Halifax

Between:

R.

v.

R. H. B.

Editorial Notice

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

Judge: The Honourable Judge C. H. F. Williams, JPC

Heard: Decision rendered orally September 9, 2003
in Halifax Nova Scotia

Counsel: Eric R. Woodburn, for the Crown
Lonny J. Queripel, for the Defence

BY THE COURT

Introduction

- [1] The accused, R. H. B., age fifty-one years, who had openly expressed a sexual preference for young men, was a co-worker of the complainant, C. L. age twenty-two years. They worked together as contracted cleaners at a local department store. On April 25, 2001, when at work, the complainant reported to store security that the accused had propositioned him for oral sex and in the process had also, without his consent, grabbed his genitals. As a result, the police have charge the accused with the sexual assault of the complainant. In his defence, the accused did not deny that he touched the complainant's genitals nor that he solicited to have oral sex with him. However, he asserted that, in the circumstances, he reasonably believed that the complainant consented to the conduct that is the subject matter of the charge. This case is therefore a consideration of whether the accused had reasonable grounds for an honest belief that the complainant consented to the erotic activity.

Relevant Evidence

- [2] (a) for the Crown

The complainant was enjoying a work break with fellow co-workers in a small janitors' room when the accused entered and they engaged in general conversation until their other colleagues departed. Then, the accused conversation became explicit concerning sexual activities. He informed the complainant that he was gay, liked him and wanted to give him a "blow job." Feeling uncomfortable, the complainant got up to leave the room but the accused wanted to touch his genitals. Notwithstanding, the complainant explained to the accused that he, the complainant, had gay friends but was not sexual with them. As he got up the complainant stretched himself and the accused made a comment and asked him whether he could touch his genitals. He also suggested to the complainant the time and location to do the "blow job." However, despite the tacit disinclination of the complainant the accused put his hand not only on the complainant's genitals, but also on his buttocks and rubbed them.

- [3] (b) for the accused

The accused was in the janitors' room when the complainant entered, sat and commenced a conversation. They were alone sitting and facing each other. The accused informed the complainant that he was sexually interested in him to which the complainant responded, "no problem." They talked about oral sex with the complainant advising him that he was not interested "at this time" and was "not doing it at [the] job." The accused was urging the complainant to make up his mind as they could arrange to get together on their day off work.

The complainant was being equivocal and wasn't sure if he wanted to engage in the suggested sexual activity

As he got up to leave, the complainant stretched himself and the accused remarked that he appeared to be comfortable with the idea. The accused then further remarked that he would like very much to touch him. Looking at him the complainant said nothing and, feeling confident the accused touched gently the complainant's genitals. The complainant looked and smiled. However, as he was leaving the room the accused told him to "keep it quiet" and asked him if he could touch him once more. Again the complainant said nothing and smiled so the accused touched him on the buttocks and said: "if you want to end it now tell me . . ." The complainant responded that "everything was fine." Then, the following conversation occurred:

Accused: Happy and content with this?

Complainant: Yes

Accused: I will meet you Sunday and if you do not show I will understand.

Findings and Analysis

[4] Here, credibility is the principal issue. I have two versions of the event, one alleging lack of consent and the other consent. Both agree that the accused propositioned the complainant for oral sex and touched his genitals and buttocks but differ in their interpretation about whether those activities were consensual. I find that there is evidence from the accused supporting his assertion of honest belief. However, on the evidence, was his belief sufficiently reasonable to give his defence an air of reality? *R. v. Osolin*, [1993] 4 S.C.R. 595.

[5] Therefore, I think that relevant to the inquiry under s.271 are the provisions of s.265(4) which states:

Where an accused alleges that he believed that the complainant consented to the conduct that is the subject matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

[6] I have the testimonies of two articulated and mature persons one of whom did not impress

me as fully candid about the event. In *R. v. O.J.M.*, [1998] N.S.J. No. 362 this court opined at para.35:

Overall, a witness' statement is considered true until there is some particular reason to doubt it. This may come about by circumstances of the inherent unreasonableness of the testimony itself, or by imputations extracted in cross-examination of the witness to infer, for example, the incredibility of a fact that reveals obvious errors. In addition, extrinsic evidence, or lack of it, may point to errors or inaccuracies in a witness' testimony and if never corrected to rehabilitate the credit of the witness, that testimony would have little or no probative value.

- [7] Further, as expressed by O'Halloran J.A., in *Faryna v. Chorny* [1952] 2 D.L.R. 354 (B.C.C.A.), at p. 357:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth.

- [8] Also on the point is this extract from the decision of Rowles J.A. in *R v. R.W.B.*, [1993] B.C.J. No.758 (B.C.C.A.), at para.28:

Where, as here, the case for the Crown is wholly dependant upon the testimony of the complainant, it is essential that the credibility and reliability of the complainant's evidence be tested in the light of all the other evidence presented.

- [9] ~~Thus, on my observations of the testimonies as filed and find~~ I find and conclude that the accused was not opposed to express candidly to any prospective sexual partner what were his sexual preferences. Likewise, I find and conclude that the complainant was neither

shocked nor alarmed to learn about the accused sexual orientation as he too had many friends whom he characterized as gay but with whom he had no sexual interest.

- [10] On the evidence, I think it is reasonable to conclude, as it is consistent with the probabilities that then existed and which a practical and informed person would readily accept as reasonable, that the accused wanted to have a sexual contact with the complainant. I find that he was candid and explicit about his desires. Furthermore, I find that he was exploring the possibilities of having sex with the complainant without being threatening or coercive but somewhat impetuous.
- [11] Likewise, on my observations of the complainant as he testified and my assessment of his testimony, I noted the ambivalence and inconsistencies in his testimony particularly on the critical issue of whether he did in fact say no to the complainant's overtures or could have left the room if he wanted to do so. I found that his cross-examination revealed facts that were inconsistent with his direct examination and revealed errors and inaccuracies in his testimony that were never corrected to rehabilitate his creditworthiness.
- [12] Having heard the accused he impressed me as candid and straightforward. He projected as a person who was confident and not ashamed of his own sexuality. For his sexual gratification, the evidence suggests that if he found someone who demonstrated a benign interest in the subject matter in which he had a preoccupation to discuss or act out, he would be inclined to pursue that person in a nonthreatening manner and, at the same time, give his quarry the option to decline without any further pursuit.
- [13] In the peculiar circumstances of this case on a careful scrutiny of the testimonies of the accused and the complainant I find that their narrative of the event was not all that dissimilar in details. Moreover, I find that the accused, in all the circumstances, did not coerce, threaten nor exercise any position of trust or authority in relation to the complainant. Likewise, I find that the complainant was not surprised to learn that the accused was gay as he too had many gay friends although he was not sexually involved. Furthermore, I find that the complainant could have left the room and ended the conversation had he wished to do so. However, given my impression of the accused and my evaluation of his testimony when weighed with the total evidence, I find that his narration of the event was in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in those circumstances. Therefore, the accused version of events, in my view, had an air of reality. In the end, I concluded that his narrative had internal coherency and context and, as a result, I believed him. *R. v. W.(D)*, [1991] 1 S.C.R. 742.
- [14] I accept and find that the complainant, whether intentionally or for other reasons, went along with the discussions and was ambivalent in his reaction to the sexual request, touching by

the accused of his genitals and buttocks and the proposed assignation. Additionally, I think that the perceived compliancy of the complainant as described by the accused given the accused own desires and expectations and the complainant's admitted friendships with persons who were of the same sexual orientation as the accused, in the end, on the evidence that I accept, I conclude that there was sufficient evidence to give the accused reasonable grounds honestly to believe that the complainant was consenting to him touching his genitals and his buttocks in anticipation of a further and other agreed upon assignation for mutual sexual gratification.

Conclusion

- [15] On my observation of the witness and my assessment of their testimonies when weighed with the total evidence, and, on the analysis that I have made, I could not find a firm foundation that would satisfy me beyond a reasonable doubt of the guilt of the accused. The complainant's version of the event, in my view, appeared probable to be a partial suppression of the truth, was inconsistent and was therefore unreliable. On the other hand, the accused version gave the event a context with an air of reality that a practical and informed person would readily recognize as probable and reasonable in the circumstances.
- [16] In short, I conclude that there was sufficient evidence to give the accused reasonable grounds honestly to believe that the complainant was consenting to him touching his genitals and his buttocks. In the result, I am not satisfied that the Crown has proved beyond a reasonable doubt that the accused R. H. B., unlawfully committed a sexual assault on C. L.. I find him not guilty as charged and will enter an acquittal on the record.