

By the Court:

[1] J. D. C. is charged under s. 271 of the Criminal Code of Canada with sexual assault on K.A.W.

Issue

[2] The only issue in this case is the issue of consent, which turns on the credibility of the two main witnesses. Although there were others present with the defendant and the complainant throughout the evening, not surprisingly no one else witnessed the alleged incident of sexual assault. It will therefore be necessary to consider their conflicting testimony in detail and in light of such of the surrounding circumstances as may tend to corroborate the testimony of one or the other.

Facts

[3] On December *, 2002 a Christmas party for * employees was held at Oak Island Inn in Western Shore, Lunenburg County, Nova Scotia. The complainant, at that time eighteen years of age, was one of two friends invited to share M. B.'s room. M., who worked at * at the time, had also invited the complainant to be his dinner guest. B. W., his other guest, could not attend the dinner but planned to spend some time at the pool.

[4] At dinner M. B. and the complainant met up with the defendant, then aged 19, and his friends, S. and K. P.. These five spent the balance of the evening together in M. B.'s room, at the dance which followed the dinner and finally, in the early hours of the morning, in the hotel bar lounge. At various times other people joined the group. Everyone was drinking and some marijuana was smoked in Mr. B.'s room.

[5] Throughout the evening the complainant showed an interest in the defendant, trying to talk to him, flirting, giving another friend her phone number to give to him. Early in the evening he was less interested in her. But later he received a telephone call from his girlfriend who was angry and upset with him because he had not invited her to the party. At that point, urged on by some male friends, he decided to "cheat".

[6] He began to flirt with the complainant and she ended up sitting on his lap. When she stood up and said she was going to the bathroom, he perceived it as an invitation to follow her.

[7] She did not object to his following her into the women's washroom off the hotel lobby, nor to his following her into one of the three or four stalls inside the washroom. No one else was in the washroom at the time, and she said she sat on the defendant's lap on the toilet. When someone else came in, they laughed together, but quietly, because it was "kind of funny". After the other person left, they kissed a bit.

[8] It is not clear who closed and locked the stall door, she says that he did; he says that she did, but I find that, whoever did so, it was consensual at that time, given the fact that she made no complaint when the other person came into the room and, in fact, laughed about it with the defendant.

[9] From this point on, their stories diverge dramatically.

The complainant's story

[10] The complainant said that after the other person left the washroom they kissed briefly. Then the defendant put his hands down her pants. She moved his hand away. He told her to stand up and face the wall. When she said, "No," he pulled her up by her arms, placed her hands on the back of the toilet, and when she refused, forced her to pull her pants down.

[11] She said that he put his erect penis in her rectum. It hurt really bad. She told him to stop and he refused. He was holding her hands on the tank with one hand and his other hand was on her hair, holding her head back. She was crying and telling him to please stop because it hurt. He said he was not going to stop until he finished.

[12] Then he said he would finish it in her mouth. He pushed her down on the toilet and tried to put his penis in her mouth. He was unsuccessful because she kept her mouth closed.

[13] She said he got angry then, pulled his pants up and said he was going to leave.

[14] He opened the stall door and they left the washroom together.

The Defendant's story

[15] The defendant acknowledged that the video statement he gave to the police in February, which was entered by consent as part of the Crown case, represented his best recollection of what happened in the bathroom.

[16] In that statement he admitted that he had been drinking throughout the evening and that his memory was affected by his state of inebriation.

[17] He said that he followed her into the bathroom and the stall, and that she shut the stall door and sat on his leg. They kissed and fondled and he put his hand down her pants. He says that she performed oral sex on him. He then took down her pants. He was worried about STD because he did not have a condom. At page 11, line 11 of the transcript of his video statement he said,

. . . I mean you always have to wear a condom. But I am drunk and sex is a little bit hard to resist when you are drunk. It's a lot to – you know – like I said earlier fuck it – I'll have sex – I had anal sex with her. I'm not sure why; I was scared to get STD but – you know, I wasn't thinking. . . . I mean you can get STD's from anal sex; that's obvious. I don't know why I didn't even think of it. So I had anal sex with her. . . [Punctuation changed from original transcript for purpose of clarity]

[18] At the bottom of p. 11, line 22 of the transcript he continues:

And so we're having sex. She's standing up facing the wall and I'm higher kinda. Not in doggie-style position but kinda standing up, both of us. She's got her hands on the toilet, and we're having sex and she's saying, "You know, you don't really like me." And I realize that[']s] cause I'm not saying -- you know, I'm not sweet-talking; I'm just having sex with a mindless dummy. Like a drunk just having sex for the sex. There's no lovemaking. . .

I remember this so clearly. She's like, "You don't like me. I'm not gonna hear from you after. You just want [sex]."

I'm like, "Oh fuck . . ." You know, I'm feeling real shitty.

So we're having sex and she's, she's saying, "It's really," – you know – "this is starting to hurt."

I'm like, "It's almost over" – you know, being a guy, being a real fucking asshole – oh – I'm like, "Yeah, it's almost over; it's okay, I'll go slower."

I take it easy and I start doing breast fondling and kissing necks – stuff like that and finally she says, “You know what – no, we can’t do this; no” and she said no. But ah – never no; now if she’d said no in the first place; if she’d said no, this hurts, I’d probably have said, “Listen, I’ll go slower,” – you know – but it’s always up to the girl to fucking say no. If she doesn’t want it, I’m not gonna do it.

[19] However, he did not stop at that point. Instead, on his own testimony, he withdrew, intending to continue with vaginal intercourse. However, he says that in his drunken condition he mistakenly re-entered her rectum.

[20] When she again said, “Stop; this hurts,”, the defendant said he looked down and saw that he was again in her rectum. He withdrew and pulled his pants up.

Surrounding circumstances

Before the event

[21] As I have previously described, the testimony of all of the witnesses confirmed that the complainant was interested in the defendant and flirted with him during the evening, a fact which she tended to minimize in her testimony, but ultimately did not deny.

During the event

[22] Angela Walfield, banquet supervisor for Oak Island Inn, testified that at some time between 11 p.m. and the time the hotel bar closed at 2 a.m. she went into the washroom in question. She was in the first stall and saw that there were two people in the next stall. She saw women’s shoes facing the door and men’s shoes facing the wall. She used the toilet and left. During the two or three minutes she was in the washroom, no one said anything.

After the event

[23] The complainant said that after she and the defendant left the washroom, she went right to M. B.’s room, but could not get in because the door was locked. She said she sat by the door, crying and calling to M. and B., who came up the stairs behind her and let her into the room. The last time she saw the defendant, he was in the lobby talking on his cellphone.

[24] She said she was crying and very upset, and that M. and B. sat with her for quite some time, trying to calm her by talking about other things, at her request. They went back down to the room where the dinner and dance had been held and sat on the stage.

[25] She felt sick and went to the washroom, where she vomited. She said that she was bleeding from the rectum and had diarrhea. Her underwear were soiled and she threw them in the garbage.

[26] Late the next day a friend took her to the South Shore Regional Hospital, where she was examined by a doctor.

[27] No medical evidence was put before the court, nor were the soiled underwear admitted in evidence, although they were recovered by the police.

[28] The defendant said that when they left the washroom the complainant was not crying, although he assumed, from what had just happened and from her silence, that she was upset. She went to the door of her room and knocked, but there was no answer. She said, "I can't believe no one's here."

[29] She came back to where the defendant was talking on his cellphone in the lobby and at that point M.'s friend stuck his head out the door of the room. At p. 13, line 19 of the transcript of the defendant's statement:

. . . And he just poked his head out and she's like, "Get out of here," and she threw her purse. And I'm like, "What are you doing?" She storms down the hall and she goes into the room. . . . I don't know what the hell to do, so I stumble . . . outdoors.

[30] Angela Walfield testified that approximately a half-hour after seeing the male and female feet in the washroom, she was again in the lobby area and happened to see a "guy and a girl" come out of the washroom. She said that neither of them appeared to be dishevelled or upset. They did not seem to be acting out of the ordinary or like they had had too much to drink. She only saw them in passing and did not notice if they met up with anyone after they came out of the washroom; they were walking normally down the corridor to a room.

[31] M. B. testified that after S. and his wife and B. had left, he and B. W. were drinking in their room when the complainant came banging at the door. He described

her as being “really shook up; she couldn’t talk righteously; she was trying to spurt out little words.” It took them about twenty minutes to get the story out of her.

[32] M. ran to find the defendant, but was unsuccessful. He went back and he and B. walked around the hotel with the complainant until about 5 a.m. trying to calm her down. He suggested that they should go to the police or hospital, but she did not want to do so.

[33] B. W. said that after everyone else left he and M. went looking for the complainant He said she came from the washroom when they were in lobby. She was upset, screaming and crying. He did not see the accused leave the washroom, either before or after the complainant. He said the three of them stood in the lobby for a couple of seconds and then went back to their room. After forty-five minutes or an hour they went back out to the lobby and then wandered around, trying to take her mind off it.

Relevant legislation

[34] Relevant portions of the Criminal Code are:

265. (1) A person commits an assault when
(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

....

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

271. (1) Every one who commits a sexual assault is guilty of

....

(b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

273.1 (1) Subject to subsection (2) . . . , "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

(2) No consent is obtained, for the purposes of sections 271, 272 and 273, where

....

(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

....

(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.

1992, c. 38, s. 1.

274. If an accused is charged with an offence under section 151, 152, 153, 153.1, 155, 159, 160, 170, 171, 172, 173, 212, 271, 272 or 273, no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.

Application to this case

[35] Bearing in mind the instruction in *R. v. W.(D.)* [1991] 1 S.C.R. 742, 1991 CarswellOnt 80, 3 C.R. (4th) 302, 122 N.R. 277, 63 C.C.C. (3d) 397, 46 O.A.C. 352, I make the following comments on credibility and findings of fact.

Actus reus

[36] On cross-examination and in the light of other testimony, it was clear that some of the complainant's testimony as to earlier events was exaggerated and coloured by what happened later. For example, I am satisfied that she did not scream or even cry in the washroom; and I cannot find beyond reasonable doubt that she was physically held or restrained by the defendant at any time, nor that oral sex was forced on her. On the whole of the evidence which I accept, I find that she consented to all sexual activities up to the act of anal intercourse.

[37] Nevertheless, although no corroboration of the complainant's testimony is required, I find that, despite the variations as to how she got back into her room, the testimony of M. B. and B. W. provides some corroboration for her evidence that she was very upset by what had happened in the washroom. Based on that corroboration,

the portions of the complainant's own testimony which I accept and especially on the defendant's own statement, I find that she did not consent to anal intercourse.

[38] I also find, again based on the defendant's statement, that she expressed her lack of consent almost immediately, if somewhat ambiguously, by saying, "This is starting to hurt." As the act continued, she expressed her lack of consent more forcefully.

Mens rea

[39] From that point forward, under s. 273.2 of the Criminal Code, the defendant cannot rely on the defence of consent. On his own evidence, he not only took no steps to ascertain whether or not she was consenting, but continued, with or without her consent, cajoling her by saying, "It's almost over; I'll go slower," and starting to kiss and fondle her.

[40] Even when she stated without equivocation, "We can't do this; no," he withdrew only to try another form of penetration, again without making any inquiry as to whether she wanted to continue or not.

[41] It was only after he mistakenly re-entered her rectum and she again said, "Stop; it hurts," that he finally withdrew.

[42] The defendant's statement makes clear his moral regrets for his behaviour that night, but also speaks to his misunderstanding of the line between what he called "bad sex" and the offence of sexual assault. It is not simply up to the girl to say, "No"; it is up to the boy to make sure she is saying, "Yes."

[43] As Major, J. stated for the majority in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, [1999] S.C.J. No. 10, 131 C.C.C. (3d) 481, 22 C.R. (5th) 1:

45 As with the actus reus of the offence, consent is an integral component of the mens rea, only this time it is considered from the perspective of the accused. Speaking of the mens rea of sexual assault in *Park*, supra, at para. 39, L'Heureux-Dubé J. (in her concurring reasons) stated that:

In order to cloak the accused's actions in moral innocence, the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question.

51 . . . 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.

52 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". . . .

Conclusion

[44] Because the defendant, on his own evidence, did not take reasonable steps to ascertain whether or not the complainant was consenting in circumstances when he should have done so, I find him guilty of the offence of sexual assault.