R. v. Betsidea, 2001 NWTSC 54

S-1-CR-2001000016

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

JACK MORRIS BETSIDEA

Transcript of Ruling on Voir Dire by The Honourable Justice J.E. Richard, with a jury, at Deline, in the Northwest Territories, on June 27th, A.D. 2001.

APPEARANCES:

A. Slatkoff, Esq., Counsel for the Crown

R. Gorin, Esq., Counsel for the Accused

Charge under s. 271 of the Criminal Code of Canada

THE COURT: In this case, the 15-year-old Complainant says that the accused had non-consensual sexual intercourse with her after she told him she didn't want to and after she told him to stop a number of times. She also said he forcibly removed her clothes, even though she resisted.

The 22-year-old accused in his testimony says that the sex was consensual and that the Complainant was a willing participant. He says when he first asked if she wanted to have sex she said no. Then he says after some more mutual kissing and fondling he asked her again if she wanted to have sex and she said yes and she started unbuckling his pants and she took his pants off.

The accused is clearly asserting a defence of consent to the charge of sexual assault.

However, defence counsel requests that, in addition, the defence of mistaken belief in consent be put to the jury for their consideration as triers of fact. Counsel cites the Supreme Court of Canada decisions in R. v. Ewanchuk and R. v. M.O. as authority for the putting of this defence. While I agree that these cases are precedents to be followed in these kinds of cases, the real question is whether there is an air of reality in the evidence in this case to justify putting this additional or alternative defence to the jury.

In the case of R. v. M.O. there was evidence of ambiguous and contradictory conduct by the Complainant in that case before the trier of fact in that case. In the appeal decision in M.O. the ambiguous response of the Complainant was crucial to the determination that there was an air of reality to a defence of mistake in that case.

Here, in this case, one cannot point to any particular behaviour or words or conduct by either the Complainant or the accused that could constitute a foundation for the defence of mistake.

Defence counsel submits that one theory that the jury could consider is that the Complainant did not, in fact, consent, but, in fact, did the participatory steps in the sexual activity that the accused says she did out of fear, thus communicating a message of consent to the accused leading to his mistaken belief in that consent. With the greatest of respect, that is not plausible on the totality of the evidence. To arrive at that theory, the jury would have had to disbelieve or be in doubt about that part of the Complainant's testimony that she told him she didn't want to do this, that she said, "Don't," that she resisted him and also disbelieve or be in doubt about that part of accused's testimony when he stated he asked her if she wanted to have sex and she said, "Yes." This kind of detailed, selective, virtually

inconsistent picking and choosing of bits and pieces of each of the two versions is simply not plausible.

This factual aspect of this case is similar to the Widow case in Fort Simpson last year. The trial Judge there ruled that there was no air of reality to the alternative defence of mistake and did not put that defence to the jury. That decision was upheld by the Court of Appeal last October.

The air of reality test in this context exists to weed out spurious defences. A presiding trial Judge has a responsibility to ensure that the jury is not confused by spurious defences so as to enable the jury to focus on the real issues in the case.

For the foregoing reasons and utilizing the test articulated by the Supreme Court of Canada, I find that nothing in the evidence in this case lends an air of reality to or constitutes a foundation for the defence of mistake.

I conclude my ruling, however, by reiterating that the Crown must still prove as an element of the offence charged that the accused knew that the Complainant was not consenting and, therefore, had the necessary mens rea for the crime.

Certified pursuant to Rule 723
of the Supreme Court Rules.

Jill MacDonald,
Court Reporter