

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

BETWEEN:

S.D.G.

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

**Restriction on Publication**

**Identification Ban** – See the *Criminal Code*, s. 486.4.

By Court Order, information that may identify the victim must not be published, broadcast, or transmitted in any way.

**NOTE:** This judgment is intended to comply with the identification ban.

**MEMORANDUM OF JUDGMENT**

**INTRODUCTION**

[1] G was convicted of one count of sexual assault and three counts of assault in Territorial Court. He appeals the sexual assault conviction.

**BACKGROUND**

[2] G and the victim were living together when the events leading to the conviction occurred. Their relationship had been troubled and at some point they had agreed that they would not engage in certain types of sexual activity, including

intercourse. They continued to engage in other forms of sexual activity such as kissing, touching and cuddling, however, and they continued to sleep together in the same bed.

[3] On the night in question the two of them went to bed after hosting a party. The victim testified that she later awoke to find G digitally penetrating her vagina and groping her roughly.

[4] The trial judge found the victim's account of the sexual assault was unreliable. He determined, however, that G's own testimony confirmed much of what the victim said, although he found the nature of the sexual assault was far less severe than the victim had described. The trial judge convicted G based on his own evidence.

### *G's Evidence*

[5] During his examination-in-chief, G said the evening was positive in terms of his relationship with the victim and he was hopeful that they would have sexual intercourse. When first describing what happened he said this:

[...] And I felt like things had really lined up. We had a great night . . . And I felt like it's pretty likely that this could be the time that we'll start sex again. I mean, it was a reasonable assumption, I thought.

So my hand wandered, and she was – she was noncommittal, but she allowed me to touch her breasts, and I touched – I kissed her a lot. And I started working my way down her body, and she kind of – I think she might have rolled over on her side away from me, and I wasn't sure how to take that, but I kept – I kept kissing her and touching her, and I wasn't getting the response from her that I had hoped. And I assume that it was probably because she was just too tired or – or too drunk, maybe, to appreciate or maybe – anyway, I wasn't getting any kind of – I wasn't getting the intimate response that I had hoped for, so I stopped.

[6] In response to a subsequent question during examination-in-chief G said:

Well, she – I took by her – I took by her rolling away from me that that was her giving me a sort of implicit no, thank you, and at which point I stopped. So I did not feel – no, there was no – there was no – she never said – to me there was no – nothing implied that there was not consent and certainly not said.

[7] The following exchanges took place during G's cross-examination:

Q. And then this all ended when she turned her back to you?

A. Yeah.

Q. Is that right? And you, at that point, stopped immediately?

A. Yes.

[...]

Q. – she turned over.

A. I mean, she – yeah, she was reacting, you know, in a normal way, you know. And – but then – yeah, then when she turned her back, I just – I got the impression – and, you know, and I think at first, when we first started kissing, there was some promise, some expectation from here that I felt. And, as I continued, I think that I could feel it waning and that she was kind of ambivalent about it. And then when she turned over, I realized, okay, it's just not going to happen.

[...]

Q. And she was – this is after you'd started to determine that maybe she's a little iffy on this?

A. Well, I don't know what the continuum was, but you know, essentially, you when I – when I – when it became obvious that she wasn't really into it, I just stopped.

### *The Trial Judge's Reasons*

[8] The trial judge had concerns about G's credibility. He rejected G's evidence that he stopped touching the victim immediately after she turned over and accepted G's evidence that he had continued to touch the victim in a sexual manner after she turned over. His reasons are set out, in part, below:

. . . this testimony contradicts what he said in the earlier part of his examination in-chief when he said that he continued touching her after she rolled away from him. His testimony changed during this part of his evidence.

Earlier in his evidence, he said that he worked his way down her body and thinks she might have rolled away from him on her side. He kept kissing her and touching her but did not get the response that he had hoped. He said that she was probably too tired or drunk to appreciate so he stopped then. Later on in his

examination in-chief, and also during cross-examination, he said that when she turned her back on him, he stopped immediately. There is a very significant contradiction in his evidence.

I am sure that the version of events that he described during examination in-chief is at least closer to the truth than what he said during cross-examination. I find that during his evidence he realized that his conduct in continuing to touch [the victim] after she turned her back on him indicating “no” was problematic. He then attempted to retreat from the admission that he had made earlier.

He initially testified that he took her turning away from him as a refusal, and he tried to continue. I find that on this version of events he sexually assaulted her although in a manner much less severe than what she described in her testimony. She was refusing further contact and according to his testimony, or at least parts of it, he knew she was refusing further contact.

There was no consent. There was no honest but mistaken belief in consent. I am satisfied that that has been proven beyond a reasonable doubt. That there was no consent, in my view, would have been all the more clear when one considers that this incident occurred during a part of their relationship during which they had agreed not to have sex and had not in fact had sex for a period of several months.

[...]

. . . I am not sure of the full extent of the sexual assault but I am convinced that at the very least, he continued to touch her in a sexual manner as he indicated in the earlier part of his examination in-chief, after she had clearly communicated to him that she was not interested by turning away from him.

*Transcript of Reasons for Decision, pp 43-45*

[9] That the trial judge did not consider G a credible witness is clear from other parts of the judgment as well. This had an impact on how the trial judge treated G’s testimony on all of the charges. Speaking in relation to one of the assault charges, where it was alleged that G had choked the victim with his hands, the trial judge stated:

[G] was deliberately lying to the Court when he testified as to his version on Count number 4, in an effort to exculpate himself on that charge. As a result of this finding, I have serious concerns with the credibility of his testimony on all of the charges presently before the Court.

*Transcript of Reasons for Decision, pp 17-18*

[10] The evidence the trial judge relied on in reaching this conclusion included an email message G had sent to a third party in which he stated “I reacted for a split second by holding her around the throat.” In his testimony in-chief G said he was pushing the victim’s shoulder blades and probably touched her throat with both hands. On cross-examination he said his hands were “in the vicinity of her throat. They’re around her throat”. The trial judge found that G was trying to “explain away” the evidence against him.

[11] The trial judge rejected G’s testimony in respect to the two other assault charges as well. In one of those, which took place on a sailboat, the allegation was that G had choked the victim. G’s evidence was that he had placed her in a “bear hug” to try and calm her when she was upset. He had, however, made a statement to a third party in which he admitted he had put his hands around the victim’s throat and squeezed it.

[12] The other assault charge arose from G “spanking” the victim during an argument. G suggested in his testimony that it was consensual and part of a “light hearted” and regular pattern of behaviour in which they both participated and that on that particular occasion, he had spanked the victim in an effort to calm her down. The trial judge found that G added details about the logistics of how the event occurred and that even if they were in the habit of this type of “light hearted” behaviour it would make no sense that G would use physical violence to de-escalate a tense situation.

## **GROUND OF APPEAL**

[13] The grounds of appeal are first, that the trial judge erred in concluding the victim withdrew her consent to the sexual touching and second, that he erred in the analysis of whether G took reasonable steps to ensure the victim had consented to sexual activity.

[14] G’s position is that the trial judge failed to distinguish between the victim’s lack of consent to intercourse (and other penetrative forms of sexual activity) and what he argues was her continued consent to other forms of sexual touching, such as kissing. Specifically, he says that when the victim turned on her side, away from G, she was communicating that she did not wish to engage in sexual intercourse; however, she was *not* withdrawing her consent to sexual touching. G argues further that there was no reasonable basis upon which he should have concluded that she had withdrawn her consent to the touching and therefore, the

trial judge ought to have inferred that he took reasonable steps to ensure the victim was consenting to this form of sexual activity.

[15] G's factum discloses two further grounds of appeal, specifically, that the conviction creates a "dangerous precedent" and that the trial judge erred by not recognizing the consequences of finding G guilty. These are without legal foundation and accordingly, they are not addressed in these reasons.

## **THE STANDARD OF REVIEW**

[16] The grounds of appeal call upon this Court review of trial judge's treatment of the evidence, the inferences he drew from the evidence and the credibility findings he made. A trial judge's findings of fact and credibility are entitled to significant deference. Those findings must not be disturbed unless there is an "overriding and palpable error". In other words, the error must be plainly seen. *Housen v Nikolaisen*, 2002 SCC 33, paras 3-5, [2002] 2 SCR 235; *R v Gagnon*, 2006 SCC 17, [2006] 1 SCR 621.

## **ANALYSIS**

[17] For the following reasons, I find that the trial judge did not commit any overriding and palpable error in drawing the conclusions that he did from the evidence, nor did he err in his analysis of the evidence on the consent issue.

[18] Sexual assault occurs where one person is intentionally touched by another in a sexual manner, without his or her consent, and where the person doing the touching knows the other person is not consenting. The *Criminal Code* provides in s. 273.1(2)(e) that there is no consent where "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".

[19] The trial judge convicted G of sexual assault because he found G continued to touch the victim in a sexual manner after she signalled her withdrawal of consent by rolling over.

[20] G gave two versions of the events respecting the sexual assault charge. The first version, provided during his examination-in-chief, was that he continued to touch the victim in a sexual manner after she turned away from him. The second version was that when the victim rolled away from him, he interpreted it as an

“implicit no, thank you” and stopped touching her. Then, during cross-examination, his evidence was that he “immediately” stopped touching her when she turned away from him. The trial judge rejected the second version because he viewed the contradiction in G’s evidence as a serious one and characterized it as an attempt to retreat from the admission he made in the first version.

[21] The trial judge based this both on his finding that G was not a credible witness and the contradiction in his evidence about the sexual assault. The record reveals a strong evidentiary basis to support the trial judge’s conclusion about G’s credibility, which has been set out above. For example, there was evidence of admissions G made to third parties, one written and one verbal, with respect to two of the assault charges which contradicted the evidence he gave about these events at the trial. With respect to the sexual assault itself, the contradiction in G’s evidence is clear. Accordingly, the trial judge’s conclusions on G’s credibility should not be disturbed.

[22] G’s argument that in turning over, the victim was communicating that she did not consent to sexual intercourse but she was not withdrawing her consent to sexual touching cannot succeed. First, it is a conclusion based on speculation. “A belief by the accused that the complainant, in her own mind wanted him to touch her but not express that desire, is not a defence. The accused’s speculation as to what was going on in the complainant’s mind provides not defence”. *R v Ewanchuk*, [1999] 1 SCR 330 at para 46, [1999] SCJ No. 10. Second, this argument cannot be reconciled with G’s evidence that he stopped touching the victim immediately after she rolled over and the evidence that he took her action as an “implicit no, thank you”. The only logical inference to be drawn from that evidence is that G knew the victim had withdrawn her consent to G touching her in a sexual manner when she turned over.

[23] The argument that the trial judge ought to have inferred that G took reasonable steps to determine if the victim was consenting is not supported by the record. There is no evidence that G took any steps to verify the victim’s continued consent after she rolled over. Further, this conclusion would be inconsistent with G’s evidence that he immediately stopped touching the victim at that point. Again, the logical inference to be drawn from this is that G knew she had withdrawn her consent.

## **CONCLUSION**

[24] There was a clear evidentiary basis to support the trial judge's conclusion that the victim had withdrawn her consent to the sexual touching, that G knew she had withdrawn her consent and that he nevertheless continued to touch her in a sexual manner. The record also supports the trial judge's findings on G's credibility. There is no overriding and palpable error. Accordingly, the appeal is dismissed.

Dated at Yellowknife, NT, this  
26<sup>th</sup> day of July, 2018.

K. M. Shaner  
J.S.C.

Counsel for the Respondent	Jay Potter
Counsel for the Appellant	Self-Represented



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