

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES
IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

ROGER ALLEN

Transcript of the Reasons for Judgment delivered by The Honourable C/Judge R.M. Bourassa, in Yellowknife, in the Northwest Territories, on the 19th day of January, A.D. 2005.

APPEARANCES:

Mr. J. Burke: Counsel on behalf of the Crown
Mr. A. Marshall: Counsel on behalf of the Accused

Charge under s. 271 C.C.

**Ban on Publication of Complainant / Witness
Pursuant to Section 486 of the Criminal Code**

1 THE COURT: The accused is charged that on
2 the 19th of May, 2004, at the Town of Inuvik, in
3 the Northwest Territories, did commit a sexual
4 assault on the person named in the Information,
5 contrary to section 271 of the *Criminal Code*.

6 The Crown elected to proceed by way of
7 summary conviction. The accused pleaded not
8 guilty.

9 These are my findings and reasons, following
10 trial.

11 I have taken the opportunity to carefully
12 study the transcripts that were entered as
13 exhibits, to review my notes of the evidence
14 adduced at trial, as well as the law provided by
15 Crown counsel and the law generally.

16 With respect to sexual assault, the Supreme
17 Court of Canada in *Regina v. Ewanchuk* clearly
18 stated the parameters of section 271 in dealing
19 with the *mens rea*, and if I may quote:

20 The *mens rea* of sexual assault
21 contains two elements: the
22 intention to touch and knowing of,
23 or being reckless of or willfully
24 blind to, a lack of consent. The
25 defence of mistake does not impose
26 any burden of proof upon the
27 accused. Support for the defence

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may stem from any of the evidence,
including the Crown's case in chief
and the testimony of the
complainant. In order to raise the
defence of honest but mistaken
belief, the evidence must show that
the accused believed that the
complainant affirmatively
communicated through her words or
actions consent to engage in the
sexual activity in question. A
belief that silence, passivity or
ambiguous conduct constitutes
consent provides no defence. An
accused also cannot rely upon his
purported belief that the
complainant's expressed lack of
agreement to sexual touching in fact
constituted an invitation to more
persistent or aggressive contact.
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

1 lapse of time or the complainant's
2 silence or equivocal conduct to
3 indicate that there has been a
4 change of heart and that consent now
5 exists, nor can he engage in further
6 sexual touching to "test the
7 waters".

8 In assessing the evidence and analyzing the
9 evidence, I am of course bound and follow *Regina*
10 *v. W.D.* If I believe the accused, that is the
11 end of the Crown's case because the accused said
12 that he had an honest belief in consent. Even if
13 I do not believe the accused, I have to ask
14 myself if his evidence raises a reasonable doubt.
15 And even if I do not believe the accused and
16 reject his evidence, I still have to be satisfied
17 beyond a reasonable doubt on the Crown evidence
18 that the case has been made out. Following the
19 analysis required by the Supreme Court of Canada,
20 then I have to look at the accused's evidence at
21 the outset.

22 There were a lot of difficulties with the
23 accused's evidence. There were a lot of
24 contradictions.

25 I will start with the transcript of the
26 interview that he had with Corporal Beland in
27 which he stated clearly and unequivocally at page

1 25 of 27, line 17:

2 No no, I ah just want to make a
3 statement here, you know I've, I've
4 been open and truthful with you.

5 And at other portions of the statement, the
6 accused indicates that in his role as Minister of
7 Justice and his knowledge of the law and the
8 judiciary and the police, he understands the
9 importance of being honest.

10 Yet, the accused today states that he is
11 mistaken in a number of areas in a statement
12 given on the 1st of June, 10 days or 11 days
13 subsequent to the alleged sexual assault, and
14 that he has subsequently thought about the matter
15 extensively and has revised his recollection of
16 what transpired.

17 None of the contradictions in and by
18 themselves are particularly dramatic, critical,
19 or crucial, but there is a combined effect.

20 For example, the accused says that he left
21 the hotel room with the victim and they came down
22 together. His own witness and the victim
23 testified that this was not the case.

24 The accused denies any knowledge that the
25 victim had made alternate arrangements for
26 accommodation, and yet in the transcript it is
27 clear that he knew either that evening or in the

1 subsequent morning that she had in fact made
2 alternate arrangements. The accused denies any
3 knowledge of the room change because of the
4 smoking issue in his evidence, but in the
5 statement again it is clear that he understood
6 that that was one of the problems.

7 The accused says in his evidence that they
8 were both standing in the room and that is when
9 he embraced her. In his statement to the police,
10 she was sitting on the bed, he was sitting on the
11 chair, and he approached her and lay down beside
12 her on the bed.

13 The accused tells us that he lay down on the
14 bed with her and pulled her shirt up, sucked her
15 breast, but denied being on top of her. He said
16 he was on her side. At another point in the
17 cross-examination he said that he kissed her on
18 the stomach and moved up. I do not want to
19 speculate on what is or is not possible in terms
20 of physical activity, but the accused saying that
21 he kissed her on the stomach and then moved up
22 seems more consistent with being on top of her
23 than being somehow side-to-side.

24 The accused said that he went to her room
25 and carried up her luggage because he wanted to
26 talk to her about scheduling, and yet at no time
27 was there any talk of scheduling. Ever. In

1 fact, she did not even know that he had a meeting
2 that night.

3 It is curious that the victim, who is
4 described in the transcript variously as
5 valuable, an asset, a hard worker, an excellent
6 employee, would resign as soon as she returned
7 from this trip to Inuvik and he never asked her
8 why. I also find it interesting that not only
9 did she receive one, but two unsolicited
10 endorsements and recommendations.

11 The accused said that in the morning after
12 she did not show up until 11:30 or 11 o'clock, he
13 did some research to find out where she was and
14 finally determined that she was at her cousin's,
15 and that he remembered a genealogical survey that
16 had been done some time ago and somehow from that
17 and a number of phone calls, found her at her
18 cousin's. I find that curious, not impossible
19 but curious.

20 But more to the point, I go to the
21 transcript on page 19, question 13:

22 **Question:** Alright. Okay. Now, I
23 hear you telling me that, you know,
24 you have the utmost respect for her
25 and, what impuled you on that day
26 to touch her?

27 **Answer:** Two things, if I can.

1 **Question:** Yeah. Oh please go ahead.

2 **Answer:** And not to be
3 incriminating. She's attractive.

4 **Question:** Hmm mm.

5 **Answer:** And secondly, I don't know
6 it was impulsive.

7 **Question:** I'm sorry?

8 **Answer:** It was impulsive.

9 **Question:** Right, right okay, yeah.

10 **Answer:** Yeah.

11 **Question:** Did she give you ah any
12 indication that this is what she ah,
13 she wanted you to do?

14 **Answer:** No. She did not give me
15 any indication, but she didn't
16 object.

17 **Question:** Okay.

18 **Answer:** At the beginning and then
19 when she began to object I, I, you
20 know, as a gentleman I ah appreciate
21 it and I, I moved on and away and
22 ah, you know obliged her request.

23 **Question:** Okay.

24 **Answer:** Or her, in this case I
25 wouldn't request but her demand.

26 The "lay" test of "no means no" is not the
27 real test; the Supreme Court of Canada in effect

1 says the test is "where is the 'yes'"? And it is
2 clear to me there was no "yes".

3 By and large, I did not think the accused's
4 evidence survived the cross-examination. The
5 accused, in his evidence on cross-examination,
6 was caught in numerous contradictions and was
7 unable to explain them other than saying his
8 recollection was better today.

9 In my view, there is no air of reality to
10 the consent the accused says he perceived, and
11 there is absolutely nothing in the relationship
12 between the accused and the complainant that
13 could be a source for an honest inference of
14 consent. In fact, in his statement to Corporal
15 Beland, the accused says that the relationship
16 was based on friendship and professional
17 relationship, and a number of occasions talks
18 about how professional it was. His relationship
19 was based on a deep respect. And in answer to a
20 question, number 22 on page 6 of the transcript:

21 **Question:** Have you in the past have
22 you made any physical advancements
23 on her ah in, in a sexual manner?

24 "No" was the answer.

25 Now, the witness for the prosecution
26 testified that before taking the job, the
27 full-year contract with the accused, because of

1 some intimacies or hugging or kissing that had
2 gone on in the past while she had worked for him,
3 she made it very clear to him that she would take
4 the job but that conduct had to end. And he
5 agreed to that; but clearly, it did not end.

6 Listening to the accused's evidence, I just
7 find it too riddled with contradictions, a
8 reconstruction with an *ex post facto*
9 justification, and I cannot accept his evidence.

10 That leaves me the evidence of the
11 complainant.

12 The complainant gave very straightforward
13 evidence. She had on occasion persuaded the
14 accused to use his credit card to do a deposit
15 for her laser eye surgery. I do not make
16 anything of that. Borrowing money from someone,
17 using someone's credit card, extending a courtesy
18 to them, sharing a tragic moment at the hospital,
19 none of that is an indication of a desire for
20 sexual contact and nor can be it construed as
21 such. A personal relationship involving speaking
22 about personal issues - divorce, marriage,
23 problems with children - or whatever else may
24 have transpired between the accused and the
25 victim, do not carry with them any kind of
26 inference of consent to sexual contact. In fact,
27 the physical contact between the accused and the

1 victim left the victim, on her evidence,
2 uncomfortable to the point where she was
3 unwilling to accept the job unless she laid this
4 out and made it very clear to the accused, which
5 she did, and she was satisfied after having done
6 so that there would be no more unwanted touching.

7 I accept her evidence that they went to the
8 room, that she did not want him to go to the
9 room; that she had made alternate arrangements;
10 that she was surprised when the accused brought
11 her luggage to her room; that as soon as the door
12 was closed and she had made the coffee, she is
13 sitting on the bed, he in the chair, he got up,
14 came over and she said "threw" her down on the
15 bed. I take that to mean, with her sitting on
16 the edge of the bed, that he lay her down, and
17 sexually assaulted her.

18 Endurance and sufferance is not to be
19 construed and cannot be construed as consent.

20 I go back again to the Supreme Court of
21 Canada in *Ewanchuk*. Where is the "yes"? There
22 was no "yes".

23 She protested. In the transcript of his
24 interview, he acknowledges that not only did she
25 say "Enough is enough" or words to that effect,
26 but she also said "no", which is consistent with
27 her evidence that when he laid her on the bed and

1 started pawing at her, she said "No, no. Roger,
2 what are you doing? No."

3 **Question:** Okay and when you laid on
4 the bed from that point on what,
5 what happened there?

6 **Answer:** Well I hugged her for a
7 long time and um then I just by
8 impulse ah, you know she's quite
9 (inaudible) you know I did ah suck
10 on her breast but there's no
11 objection. But other than that
12 there's no other physical ah attempt
13 to try to and I, and I can't lie to
14 you, there's no other physical
15 attempt to, to get into her pants
16 cause she said no. And eh so I got
17 up and she said eh, I went
18 downstairs and eh, then she came
19 down. And then I do have two ahem,
20 two witnesses that saw me hand her
21 forty dollars for lunch money. And
22 that's ah, that's that the honest
23 part of my story.

24 And when the phone rang, that was her escape
25 valve, and she also said at the time words to the
26 effect that "That's it, that's enough", and may
27 very well have said other words. Nothing in

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particular turns on what exact words were said.
What is important is that she said "no", she said
"That's it, enough's enough", and even though she
said "no" the accused continued; it was only the
phone call that interrupted things.

In the end then, I find that the offence is
made out as described by the Crown witness and
the accused is convicted.

.....

Certified to be a true and
accurate transcript pursuant
to Rule 723 and 724 of the
Supreme Court Rules of Court.

Annette Wright

Annette Wright, RPR, CSR(A)
Court Reporter