

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

EDWARD FRANK ALBERT

**REASONS FOR DECISION
of the
HONOURABLE JUDGE DONOVAN MOLLOY**

Restriction on Publication

This decision is subject to a ban on publication pursuant to s. 486.4 CC with respect to the name of the victim as well as information that may identify this person. Some details may have been edited to ensure that the victim may not be identified.

Heard at: Yellowknife, Northwest Territories

Date of Decision: June 12, 2019

Date of Trial: April 3, 2019

Counsel for the Crown: Travis Weagant

Counsel for the Accused: Baljindar Rattan

[Section 271 of the *Criminal Code*]

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A. INTRODUCTION

[1] Sleeping on a couch can lead to discomfort. Waking up on a couch with a stranger's penis in your face is traumatizing. Mr. Albert twisted his mother's act of charity into an experience that caused significant harm to the complainant. Mr. Albert exposed his penis to the complainant, T.K., but he did not touch her with it.

[2] In these circumstances the issues I must decide are:

1. Did Mr. Albert commit a sexual assault as defined in sections 265(1)(b) and 271?; and,
2. If he did not, did Mr. Albert attempt to commit a sexual assault on T.K.?

B. THE EVIDENCE PRESENTED AT THE TRIAL

[3] The Crown called three witnesses, T.K., the complainant, her mother, V.C., and the investigator, Constable Olivier Charbonneau.

[4] On September 7, 2018, T.K. and her mother slept at Corrine Albert's apartment. Ms. Albert, the accused's mother, is an acquaintance of the complainant's mother. The accused resided with Ms. Albert.

[5] T.K.'s evidence included that:

- She intended to sleep at the Alison McAteer House, a shelter for women in Yellowknife;
- She was denied entry to the shelter because the staff smelled booze off her and they told her to sober up before coming back;
- Earlier that day she walked around Yellowknife in the company of her boyfriend's mother, P.A.K. She and P.A.K. were consuming alcohol. She consumed a mickey of "bad rye" and "a wine" that day;
- After P.A.K. took off on her, she met up with her mother, V.C., on the streets of Yellowknife, and they spent some time talking and walking around;
- V.C. walked with her to the shelter and after staff denied her entry, took her to the nearby apartment of Ms. Albert to spend the night;
- She did not consume any alcohol at Ms. Albert's apartment;
- She slept in the living room on a chair (small couch), with her mother sleeping on the floor and Ms. Albert sleeping on the large couch;
- She awoke in the early morning hours as she felt like someone was watching her. On waking, she saw the accused's penis about 2 inches from her face. The accused's pajama bottoms were down to his knees. After confronting him by yelling "what are you doing", the accused immediately left the living room and did not return;
- She believed the accused's penis was erect but was not sure;
- Neither V.C. nor Ms. Albert woke during the incident;

- Her attempts to wake her mother were unsuccessful as her mother told her to go back to sleep;
- She did not leave the apartment on her own as she was concerned that the accused might do something similar to her mother;
- She was not in possession of a mobile phone or aware whether there was a phone in the apartment;
- She did not immediately tell her mother what happened when they left Ms. Albert's apartment; and,
- On returning to the Alison McAteer House she told P.A.K. what happened and later called the police to report it.

[6] On direct examination, T.K. was asked about her clothing:

Q When you went to sleep that night, what were you wearing?

A I was wearing a sweater and jeans.

Q And is that what you were wearing when you woke up as well?

A Yeah.

[7] Nothing else was asked or said about her clothing on direct examination. On cross examination, defence counsel asked T.K. about touching by the accused, leading to the following:

Q And he did not touch you, correct?

A No, my -- no. My pants were undone though so he had to have touched me around there because my pants were undone, and his penis was right in front of my face.

Q How were your pants undone?

A The button was undone and the zipper was undone.

Q And these were jeans that you were wearing that night?

A Yes.

Q And is it possible that you undid them when you --

A *Why would I undo them?*

Q *So you were undone, his penis was out, he didn't touch you, and you didn't touch him, as far as you know?*

A *Yeah, I don't know if he touched me or not. His penis was right there though.*

[8] V.C.'s evidence included that:

- She had spent the day walking around Yellowknife, talking to people and consuming alcohol;
- She could not remember how much alcohol she consumed that day;
- She met up with T.K. later in the day, and they talked and walked around a bit;
- T.K. was a little “tipsy” but she was okay;
- Staff at the shelter told T.K. to sleep it off and then come back;
- She took T.K. to her friend Corrine Albert’s apartment as it was close by;
- She spoke briefly to Eddie, the accused, in his bedroom;
- She did not recall anyone trying to wake her up during the night;
- When she woke up in the morning, T.K. was lying next to her on the floor;
- She parted company with T.K. shortly after leaving the apartment; and,
- She was told later that day what happened by P.A.K.

[9] Constable Charbonneau’s evidence simply confirmed receipt of the complaint from T.K., her subsequent audio-recorded interview and his attendance at Corrine Albert’s apartment.

[10] As no evidence was led, it is unknown whether the investigator attempted to speak to staff at the Alison McAteer House. There were a number of points on which such evidence could have been of assistance in this matter. T.K. pointed this out in responding to counsel’s questions:

Q Do you have a record of being there?

A You can go ask them.

Q Do you, yourself, have a record of being there at 7:15?

A I don't have a record but you can go ask the Alison McAteer because they have all the records of when people come in and leave.

[11] Unfortunately, this is common in sexual assault investigations. Sexual assault trials are often referred to as challenging because of the so called 'he said-she said' dynamic. The sad reality is that sexual assault investigations are often mainly limited to interviewing the complainant and the accused. Some unpursued avenues of investigation could assist the Court in its efforts to determine whether the offence of sexual assault has been proven. In some respects the 'he said-she said' label trivializes the offence of sexual assault. It also contributes to investigations that fail to pursue other potentially viable avenues of investigation.

[12] While legally no corroboration is required, any sources of evidence that might substantiate or refute an allegation of sexual assault enhance the ability of the Court to get at the truth. The evidence need not be determinative and may, for example, simply provide independent evidence of the degree of impairment of an accused/complainant. Such evidence can be valuable in considering testimonial competence and vital in assessing the capacity to consent to sexual activity and/or an accused's claim of mistaken belief in consent.

C. THE ONUS AND STANDARD OF PROOF

[13] Like all persons charged with an offence, Mr. Albert is cloaked with the presumption of innocence until such time as the Crown proves his guilt. Assessing whether guilt is proven requires consideration of the whole of the evidence, as opposed to scrutinizing individual items on a piecemeal basis (*R. v. Kennedy*, 2015 NLCA 14; *R. v. Abramoff*, 2018 SKCA 21).

[14] While the beyond a reasonable doubt standard does not require proof to an absolute certainty, it is much closer to that standard than it is to the balance of probabilities (*R. v. Lifchus*, [1997] 3 S.C.R. 320; *R. v. Starr*, [2000] 2 S.C.R. 144).

[15] Demeanor is of limited utility (*R. v. Dyce*, 2017 ONCA 123) and stereotypes play no role, especially where allegations of sexual assault are involved (*R. v. A.R.D.*, 2017 ABCA 237).

[16] Reliability must be considered in assessing the evidence in this case. The consumption of alcohol may have diminished the abilities of T.K. and V.C. to observe and remember. The inconsistencies between them with respect to the timing of their movements that day, who went to sleep first and, whether T.K.

attempted to wake V.C. up after the incident illustrate reliability issues. While not material inconsistencies, they highlight the need to consider the truthfulness and accuracy of the witnesses' testimonies. The testimony of a truthful witness may not be reliable where circumstances detract from that witness's ability to observe, remember and, communicate recollections of the events in question.

D. ELEMENTS OF THE OFFENCE

[17] The *actus reus* of sexual assault requires touching of a sexual nature in the absence of consent. The *mens rea* requires an intent to touch with knowledge, recklessness or willful blindness towards the absence of consent (*R. v. Ewanchuk*, [1999] 1 S.C.R. 330). Assessment of the sexual nature of the touching is done on an objective basis. The essential question is whether in all of the circumstances the sexual integrity of the complainant was violated (*R. v. Chase*, [1987] 2 S.C.R. 293).

[18] By virtue of section 265(2), assaults, including sexual assaults, do not require actual touching. A person is guilty of assault if, as stated in section 265(1)(b), he attempts or threatens, by an act or a gesture, to apply force to another person, while having or causing that other person to believe on reasonable grounds that he has, the present ability to effect his purpose. Such assaults are sometimes referred to as constructive or psychic assaults (*R. v. Patrick*, 2017 SKCA 95).

E. PARTIES' POSITIONS

[19] Concessions were made regarding identity, date of the alleged offence, jurisdiction and, lack of consent.

[20] The Crown's oral submissions focused on the constructive nature of the sexual assault, noting, "So what I propose to spend the most time on in my submissions today are the -- how this constitutes an assault, **primarily, given that there was no touching**. I mean, certainly that's not required for the events to be made out. What the Crown's relying on today is provisions of 265(1)(b) of the Criminal Code, in specifically that there was an attempt". [emphasis added]

[21] On asking what, if any use, the Court could make if it found as a fact that Mr. Albert undid T.K.'s button and zipper, the Crown stated that such a finding could be another path to conviction.

[22] The Court requested written submissions after receiving no case law or authority on constructive sexual assault. In its written submissions, the Crown shifted its focus to section 265(1)(a) "as the plainest path to conviction". The Crown maintains that the only reasonable inference to be drawn from the

circumstantial evidence is that Mr. Albert undid T.K.'s button and zipper, and that this direct application of force constituted an assault that violated the sexual integrity of T.K., especially considering his exposed penis.

[23] The Defence, in its oral submissions, maintained that if "Ms. K's evidence is accepted, the information is that there was either some form of some possible attempt, but it didn't go to fruition, if you will. It looks very suspicious".

[24] Generally, the Defence maintained force was not used or threatened and that the Court should be reluctant to accept the evidence of the T.K. and V.C. due to their alcohol consumption and the inconsistencies between their testimonies.

[25] In response to the Court asking about the use, if any, that might be made of T.K.'s button and zipper being undone, the Defence replied, "It would seem if somebody's going to go to sleep in their jeans that they may well undo the pants".

[26] In its written submissions, the Defence reiterated its oral submissions and argued that:

- There were other inferences that arose from the circumstantial evidence other than Mr. Albert having undone T.K.'s button and zipper; and,
- Even if the Court could find that the *actus reus* and *mens rea* were proven, they were not proven to ever have existed at the same time.

F. ANALYSIS

Did Mr. Albert commit a sexual assault as defined in sections 265(1)(b) and 271?

[27] The Crown has not proven, on the beyond a reasonable doubt standard, that the only reasonable inference here is that the accused undid the complainant's button and zipper.

[28] While there were some inconsistencies between the evidence of T.K. and V.C., they are not material. The evidence of both was consistent with the preponderance of probabilities expected to exist given all of the circumstances at the material times.

[29] T.K. had no prior relationship with either Corrine or Edward Albert. She was not shaken on cross-examination as to waking up to the accused's penis in her face. While upset, she did not embellish or otherwise exaggerate what occurred that night.

[30] To draw a negative inference regarding her remaining in the apartment after the incident would require stereotyping responses to sexual assault. Further, staying to ensure that nothing would happen to her mother, who she could not wake up, explains that choice. Not first telling her mother what happened is also understandable given the Court's inference that she was mad at the mother for taking her to that apartment and for not waking up.

[31] Accepting T.K.'s evidence as to what occurred does not automatically lead to concluding that the accused undid her button and zipper. As T.K. was asleep, there is no direct evidence on that point.

[32] The Crown argues that the only reasonable inference arising from the circumstantial evidence is that the accused undid T.K.'s button and zipper. The Defence, citing *R. v. Villaroman*, 2016 SCC 33, notes an absence of evidence and argues that to require the accused to adduce evidence negating other reasonable inferences would unfairly place the burden of proof on him.

[33] Having introduced the evidence on cross-examination regarding the button and zipper, the Defence wisely chose to limit further probing in that area. On re-direct, the Crown only asked T.K. if she undid her button and zipper prior to going to sleep. T.K. responded, "No, why would I do that".

[34] A number of reasonable inferences might arise here. Without any other evidence such as the fit of the jeans, or past experiences, if any, sleeping in those or other jeans, it is not possible to conclude that the only reasonable inference is that the accused undid T.K.'s button and zipper. Such evidence might also shed light on whether it would have been difficult to undo her button and zipper without T.K. waking up.

[35] This does not mean that in similar cases the Crown needs to negate all other possibilities. It does mean that if the Crown does not negate reasonable possibilities, in the absence of such evidence, doubt may exist. In this case, the failure to negate other reasonable possibilities means the Court is unable to conclude that the only reasonable inference is that the accused undid T.K.'s button and zipper. It is the most likely inference, but not the only reasonable inference.

[36] The inability to make that inference does not end the matter as on the evidence as accepted, T.K. awoke to Mr. Albert standing next to her, with his penis in her face and his pajama bottoms down to his knees.

[37] During oral submissions, the Crown was asked what was the act or gesture being relied upon to found a conviction pursuant to section 265(1)(b). The Crown replied, "Well, it's not the cause, to be clear, sir, I'm not relying on that portion of

the section, it's the -- it's that, in fact, he had the present ability to carry out his purpose”.

[38] In the absence of proof of an act or gesture attempting or threatening to apply force to another person, the Crown cannot prove that a constructive assault occurred. When T.K. woke up, the accused was not positively engaged in any act or gesture. While undoubtedly his conduct was offensive and caused T.K. significant trauma, the Crown has not proven that the accused's conduct constituted a constructive sexual assault.

Did Mr. Albert attempt to commit a sexual assault on T.K.?

[39] It certainly appears that T.K.'s waking and yelling at the accused interrupted him in whatever he was doing. Sections 24 and 463 allow for a conviction where the Crown proves beyond a reasonable doubt that an accused attempted to commit the offence of sexual assault. In **R. v. Niemi**, 2017 ONCA 720, the Court held:

To be guilty of an attempted sexual assault, the accused must intend to commit the offence of sexual assault, and must engage in an act that goes beyond preparation and is not too remote from the consummation of the crime.

[40] The closest authority the Court could find to the facts of this matter is **R. v. Campbell**, [2003] O.J. No. 5079. The accused filed an application for certiorari, challenging his committal for trial on a sexual assault charge. The evidence established that he masturbated onto the bed where the complainant was sleeping. It was possible that the complainant rolled into the 'wet spot' as opposed to the accused masturbating directly on the complainant. In dismissing the accused's application, the Court held:

Accordingly, where a person, in the night, in the darkness of a bedroom in which he has no lawful right to be, ejaculates in close proximity to a naked occupant asleep on a bed, there is some evidence of an attempt, in sexual circumstances, to apply force to another person even if the ejaculate misses its intended target of striking the prone body.

[41] As a statement on the law, the references in **Campbell** to darkness, lawful right and nudity are largely irrelevant. Regardless of the circumstances, anyone who ejaculates in close proximity another person, without their consent, may be guilty of an attempted sexual assault.

[42] In this matter there is no evidence of the accused masturbating or doing anything other than standing near the complainant with his penis near her face.

While repugnant, in and of itself that act does not constitute an attempted sexual assault. The most likely inference is that the accused, prior to the complainant waking up, was going to masturbate (or worse); however, that is not the only reasonable inference available. The Court cannot rely on speculation as a substitute for proof of intention. As such, the Crown has not proven that the accused attempted to commit a sexual assault.

G. CONCLUSION

[43] For the reasons provided Mr. Albert is acquitted on the charge of sexual assault.

[44] Judgement accordingly.

DONOVAN MOLLOY, T.C.J.

Dated at Yellowknife, Northwest Territories,
this 12th day of June, 2019.

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