In the Provincial Court of Alberta

Citation: R. v. [redacted] 2016 ABPC 39

Date: 20160218
Docket: 150352219P1
Registry: Calgary

Between:

Her Majesty the Queen

- and -

[redacted]

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4. By Court Order, information that may identify the complainant must not be published, broadcast, or transmitted in any manner.

NOTE: This judgment is intended to comply with the restriction so that it may be published.

Decision of the Honourable Judge M.T.C. Tyndale

Introduction

[1] [redacted] is charged with the sexual assault of C.C. arising out of events which occurred on March 3, 2015. The trial was held before me on November 12, 2015, in [redacted] Provincial Court. This is my judgment in this matter.

Issues

[2] The first issue is whether the Crown has proved beyond a reasonable doubt the three essential elements of the *actus reus* of sexual assault. The second issue is, in the event that the Crown has failed to prove a sexual assault, has the Crown has proved a common assault.

Evidence of the Complainant

[3] Between January 2015 and March 3, 2015, C.C. worked for [redacted] in his residential cleaning business. On March 3, 2015, C.C. and [redacted], along with two other female employees, were cleaning a home. C.C. was cleaning in the kitchen area of the open-concept house. One of the other women was upstairs cleaning the master bathroom. The other female employee was cleaning downstairs. [redacted] was vacuuming in the livingroom/diningroom area.

[4] C.C. moved into the diningroom area and began dusting a glass table. [redacted] was vacuuming across the room. He was using a vacuum hose attached to an in-wall system, similar to a Vacu-Flo system. The hose was plugged into a hose outlet just below the glass table. As the vacuum was still running, C.C. did not hear [redacted] approach her. [redacted] stood directly behind her and placed his hands on her hips. C.C. stepped out of the way. C.C. did not hear [redacted] say anything before or after the touching. After she moved out of the way, [redacted] unplugged the hose, moved it to another hose outlet, and continued vacuuming.

[5] C.C. was very upset, but tried not to show it. She texted her mother, asking her what she should do. After a short time, C.C. made an excuse, left the house, and ran down the street. She knocked on the door of the Ruff house. Upset and crying, she was taken in by the [redacted] who called police.

[6] C.C. described the contact as "a hold, not a touch." It lasted a couple of seconds, with firm pressure. She felt the touch "totally crossed the line." She felt [redacted] had gone out of his way to touch her in order to move the vacuum hose. She said the touching made her feel "awful". She felt violated. She felt there was no need for [redacted] to touch her, as he could have asked her to move.

[7] C.C. related that [redacted] had touched her prior to this incident during the time she had worked for him. He had touched her shoulder, or her back. When telling a joke in the vehicle, he had tapped her knee. She recalled these touches as being playful or innocent.

[8] On March 3, when [redacted] touched her with both hands on her hips, she felt he had touched her inappropriately. She said it "all came together." She stated she was afraid something more was going to happen.

[9] In cross-examination C.C. recalled that [redacted] had picked up all three female employees and driven them to the house to clean. [redacted] had picked up C.C. at her home as she did not have a vehicle.

[10] C.C. recalled that as she moved to clean the glass table, she could see [redacted] vacuuming in the livingroom. She was, therefore, surprised to feel his hands on her hips. In reaction, she quickly moved to one side. [redacted] stepped into the space she had vacated, unplugged the vacuum hose from the wall, moved the hose to the other end of the livingroom, and kept vacuuming.

[11] C.C. had worked for [redacted] on 25 to 30 occasions. They had spoken together many times. She agreed the not once had [redacted] said anything to her of a sexual nature. Just the previous week, C.C. and [redacted] had worked together, alone, at night, cleaning commercial premises. Everything had been "professional."

[12] C.C. agreed that it had happened in the past that [redacted] had touched her in order to move her, for example, when they were working in close proximity.

[13] C.C. categorically denied that on March 2, the day before the incident, she had called in sick, claiming she had a doctor's appointment, but in fact, her mother had driven her to a job interview. C.C. agreed that she had claimed as restitution against [redacted] $1620 for bodily harm and psychological harm.

Other Crown Evidence

[14] An Agreed Statement of Facts was read into the record that M.G., the mother of C.C., gave a statement to the police on March 3, 2015, that on March 2, 2015, at 3:30 pm she had driven her daughter to a job interview in Springbank, Alberta.

[15] [redacted] testified that on March 3, 2015, a crying and hysterical young girl had knocked on her door. She and her husband had brought her inside, and called the police.

Evidence of the Accused

[16] [redacted] has owned and operated the residential cleaning company for approximately 8 years. In March 2015, he had about 6 female employees. He has no criminal record.

[17] In relation to C.C., [redacted] denied having expressed any romantic interest in her. He denied that she had expressed any romantic interest in him. He denied that he had any sexual interest in her.

[18] [redacted] described that on the day in question, he was using a central vacuum system and was vacuuming in the diningroom and livingroom. The hose was plugged into an outlet in the diningroom under the glass table. C.C. had finished cleaning in the kitchen and had moved to dusting in the diningroom. When [redacted] reached the end of the length of the hose, C.C. was dusting the glass table.

[19] [redacted] described the contact between them as follows: "I walked over to her, touched her to move her, she moved, and I moved the hose." He was not exactly sure where he had touched her. When asked why he had touched her, he replied, "I needed her to move."

[20] In cross-examination [redacted] was clear that he had asked C.C. and touched her. She moved. This had happened before, and was common among those working closely together. He had not asked C.C. for permission to touch her. He had assumed it was okay to touch C.C.

The Law: *Actus Reus* of Sexual Assault

[21] The leading case setting out the essential elements of the offence of sexual assault is ***R. v. Ewanchuk***, reported at [1999] 1 SCR 330. In it, Justice Major, for the court, says as follows:

> 23 A conviction for sexual assault requires proof beyond reasonable doubt of two basic elements, that the accused committed the *actus reus* and that he had the necessary *mens rea*. The *actus reus* of assault is unwanted sexual touching. The *mens rea* is the intention to touch, knowing of, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched.

(1) *Actus Reus*

24 The crime of sexual assault is only indirectly defined in the *Criminal Code*, R.S.C. 1985, c. C-46. The offence is comprised of an assault within any one of the definitions in s. 265(1) of the Code, which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated: see ***R. v. S.*** (P.L.), [1991] 1 S.C.R. 909 (S.C.C.). Section 265 provides that:

> 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;
>
> (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
>
> (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.
>
> (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.

25 The *actus reus* of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent. The first two of these elements are objective. It is sufficient for the Crown to prove that the accused's actions were voluntary. The sexual nature of the assault is determined objectively; the Crown need not prove that the accused had any *mens rea* with respect to the sexual nature of his or her behaviour: see ***R. v. Litchfield***, [1993] 4 S.C.R. 333 (S.C.C.), and ***R. v. Chase***, [1987] 2 S.C.R. 293 (S.C.C.).

Application of the Law to the Facts

[22] Both counsel agreed in argument that the first and third required elements of the *actus reas* of sexual assault, above, have been established. The issue is whether the Crown has proved beyond a reasonable doubt the sexual nature of the touching.

[23] In determining this issue, I have weighed the following factors:

> 1. The part of the body touched. C.C. testified that the Accused placed his hands on the outside of her hips, over her clothes. The outside of the hips, above the clothes, is not an area of the body ordinarily included within the definition of "private parts"; that is, there is nothing inherently sexual about that part of the body, and it is not an area encompassing external sexual organs, or secondary sexual characteristics.
>
> 2. The nature of the force used. C.C. described the touch as "a hold, not a touch", with firm pressure. I do not find that the nature of the force employed compels

me to the conclusion that the touching was sexual in nature.

3. The duration of the touch. C.C. described the touching as lasting a couple of seconds. I do not find that the duration of the touch leads inevitably to the finding that the touch was sexual in nature.

4. The location of the touching. The touching occurred in daylight, in an apparently well-lit great-room area of a house being cleaned by the Accused and his employees. Although the complainant and the Accused were, at that time, alone in that area of the house, there were two other female employees of the Accused's company within the house who were free to come and go unexpectedly.

5. Other actions of the accused. There were no actions of the Accused accompanying the touching which might have painted the touching in a sexual light. For example, there was no evidence that the Accused pulled C.C. toward him, or otherwise brushed against her.

6. Any words of the accused accompanying the contact. There were no words of a sexually suggestive nature uttered by the Accused concurrent with the touching which might have served to place the touching within a sexual context. Rather, [redacted] evidence was that he had asked to move, touched her, and she moved.

7. The Accused's actions immediately following the touching. Both the complainant and the Accused testified that when the Accused touched C.C., she moved to one side. Without pause, the Accused released her, bent down and unplugged the vacuum hose from the wall outlet and moved to another part of the house to continue vacuuming.

8. The intent of the accused. The Accused testified that he had no sexual intent at the time of the touching, and the Crown accepts that the Accused may have had no sexual intent at the time of the touching.

9. The historical context of the touching. The complainant testified that the Accused had touched her on a number of occasions during the course of her employment. She felt these were, in her words, "innocent." I do not raise this to imply that because the complainant had impliedly consented to the previous contact that she can be taken to have consented to this contact. She clearly did not. I also do not raise this in support of a finding that because prior contact had not been complained of, the Accused therefore believed she was consenting on this occasion. His testimony contained no such claim. I consider this simply to show that no evidence of the sexual nature of this contact could be inferred by reference to previous contact. That is, there was no evidence of "grooming" of the complainant, or of any escalating conduct by the Accused.

Conclusion

[24] In considering the above factors, and the evidence as a whole, I am not satisfied that the sexual context of the touching would be apparent to any reasonable observer. ***R. v. Morrisey***, 2011 ABCA 150 (Alta. C.A.). Determined objectively, I am not persuaded that the touching was sexual in nature.

[25] I am left with a reasonable doubt as to the sexual nature of the touching. I conclude, therefore, that the Crown has failed to convince me beyond a reasonable doubt that the touching was sexual in nature. I find the Accused not guilty of the charge of sexual assault.

[26] That does not end the matter. I must now determine whether the evidence proves beyond a reasonable doubt that the Accused is guilty of assault simpliciter.

Assault

[27] The relevant portion of section 265 of the *Criminal Code* defines assault as follows:

> 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;

***Mens Rea* of Assault**

[28] The unwanted touching alone does not constitute intentional application of force so as to constitute assault; the touching must be accompanied by "hostility, animus or improper intent": ***R. v. Pederson***, 2010 ABPC 287, at paras 34 and 36, ***R. v. C. (A.S.)***, 1996 CarswellAlta 470 (Alta.Prov.Ct), at paras 26-27. "Improper intent" appears to be a high threshold: ***R. v. Matsuba,*** 1993 CarswellAlta 599 (Alta.Prov.Ct). Acting out of "force of habit" may render the act not intentional: ***R. v. McLeod***, 2006 ABPC 114.

***Actus Reus* of Assault and the De Minimis Principle**

[29] In ***R. v. Morrow***, 2009 ABPC 114, Judge LeGrandeur reviewed the *actus reus* of assault:

> 49. The character of a man's act is dependent upon the circumstances in which it occurred. There is a contextual aspect to every assault charge. Not all touching is assaultive, not all application of restraint by one person on another is assault. It is always dependent upon the circumstances that accompany the act. This has been recognized by the Supreme Court of Canada on more than one occasion. In ***R. v. Jobidon***, (1991) 66 C.C.C. (3d) 45, (S.C.C.), the Court discussed the broad definition of assault set out in the *Criminal Code* at para. 65:
>
> > Assault has been given a very encompassing definition in s.265. It arises whenever a person intentionally applies force to a person "directly or indirectly", without the other's consent. The definition says nothing about the degree of harm which must be sustained. Nor does it refer to the motives for the touching. If taken at face value, this formulation would mean that the most trivial intended touching would constitute assault. As just one of many possible

> examples, a father would assault his daughter if he attempted to place his scarf around her neck to protect her from the cold but she did not consent to that touching, thinking the scarf ugly or undesirable (even an argument for implied consent would not seem to apply in a case like this.). That absurd consequence could not have been intended by Parliament. Rather its intention must have been for the Courts to explain the content of the offence, incrementally and over the course of time.

50. In the constitutional case of ***Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)***, 2004 SCC 4 ("Canadian Foundation"), Arbour J. made the following comments with respect to common offences and defences and the use of force and criminal culpability:

> 136. Setting aside any constitutional considerations for the moment, courts are expressly prohibited by s.9 of the Code from creating new common law offences. All criminal offences must be enacted by statute. On the other hand, the courts have been and continue to be the guardians of common law defences. This reflects the role of courts as enforcers of fundamental principles of criminal responsibility including, in particular, the fundamental concept of fault which can only be reduced or displaced by statute.

51 She went on to note that the use of force never automatically triggers criminal liability:

> 148. Parliament has not dictated *a priori* that use of force will never be reasonable in any circumstances. The statutory framework is one that leaves the appreciation of reasonableness to the courts to develop on a case-by-case basis as the myriad of live circumstances are brought before the courts or are screened out by prosecutorial discretion. This is not a novel approach either in the law generally or within the criminal law context where reasonableness often plays a crucial part in the determination of criminal responsibility. ...

52. It is clear that not every touching by a parent of his or her child is an assault even if the touching is unwanted by the child. That cannot have been the intention of Parliament when it enacted s.265. Literal application of the definition of assault in s.265 would mean every touching of a child, even if it were directed at saving a child from harm, would be an assault (Murphy, para. 35). Common sense requires that the reality of the action be considered in the circumstances of its happening.

53 In each case the culpability of the alleged offender must be dependent upon the context and circumstances in which the act of the alleged offender occurred. ...

[30] Similarly, in ***R. v. Breadner***, 2015 ABPC 131, Judge Shriar summarized:

> [49] In ***R. v. Jobidon***, [1991] 2 SCR 714, the Supreme Court of Canada commented on the absurd consequences that would flow if every form of even trivial contact between two people was considered an assault, given a very broad definition of assault in the *Criminal Code*. Although the case concerned the issue of consent, in the end the court held that it is up to trial courts to consider the application of force in the context of the facts.

[31] A number of courts, in characterizing an accused's alleged assault as minor or trivial, have applied the "*de minimis non curat lex*" defence.

[32] There does not appear to be any decision of the Supreme Court of Canada or of any Court of Appeal which settles the question of whether the doctrine of "de minimis" applies in Canadian criminal law.

[33] In ***R. v. Hinchey***, [1996] 3 SCR 1128, Madam Justice L'Heureux-Dubé made the following comments:

> 69 In my view, this interpretation removes the possibility that the section will trap trivial and unintended violations. Nevertheless, assuming that situations could still arise which do not warrant a criminal sanction, there might be another method to avoid entering a conviction: the principle of *de minimis non curat lex*, that "the law does not concern itself with trifles". This type of solution to cases where an accused has "technically" violated a Code section has been proposed by the Canadian Bar Association, in ***Principles of Criminal Liability*** (1992), and others: see Professor Stuart, ***Canadian Criminal Law*** (3rd ed.) at pp. 542-46. I am aware, however, that this principle's potential application as a defence to criminal culpability has not yet been decided by this Court, and would appear to be the subject of some debate in the courts below. Since a resolution of this issue is not strictly necessary to decide this case, I would prefer to leave this issue for another day.

[34] Judge Fradsham gave a useful overview of the appellate decisions dealing with "de minimis" in ***R. v. Tan***, 2010 ABPC 163, at paragraphs 46-50.

[35] In ***R. v. Chapman***, 2008 ONCJ 552, Justice Harris, in paragraphs 6-33, reviewed a number of cases which had considered the de minimis doctrine, and then concluded:

> 42 Neither the Supreme Court of Canada nor the Ontario Court of Appeal has conclusively ruled that the maxim *de minimis non curat lex* applies to criminal law in Canada. I do not propose to decide that issue here. Nor do I need to. Even if the maxim may be applied in appropriate cases, this is not one of those cases.

[36] In ***R. v. Hnatiuk***, 2000 ABQB 314, Madam Justice Viet found:

> 33 Although the *Criminal Code* has not been amended in the way suggested by various authors, judges and the Canadian Bar Association to codify the defence of de minimis, this defence applies in Canadian criminal law: McBurney. The limits of the defence, however, are relatively narrow and cannot be extended beyond the limits as suggested by Professor Stuart in his reference to the Model Penal Code:
>
> Section 2.12 De Minimis Infractions

> The Court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:
>
> (1) was within a customary license or tolerance, neither expressly negatived by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense; or
>
> (2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
>
> (3) presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.

[37] The ***Hnatiuk*** *(supra)* case was distinguished by the Manitoba Court of Appeal in ***R. v. Nicol***, 2002 MBCA 151, on other grounds, but has not been overturned by any appellate courts. While the portion of the ***Hnatiuk*** *(supra)* judgment reproduced above is strictly speaking *obiter dicta*, it is a strong statement of the law, and is, if not binding on me, highly persuasive.

[38] I find, therefore, that the defence of "de minimis" is applicable to Canadian criminal law. That conclusion is shared by the majority of reported judgments, for example: ***R. v. Murdock*** (2003) 176 C.C.C. (3d) 232 (Ont. C.A.), ***R. v. L.(R.H.)*** [2008] N.S.J. No. 468 (NSCA), ***R. v. Lepage*** [1989] S.J. No. 579 (Sask. Q.B.), ***R. v. Kiemele***, 2011 ABPC 325, ***R. v. McLeod***, *supra*, ***R. v. Harrison*** 1992 CarswellAlta 961 (Alta.Prov.Ct), ***R. v. Thornton*** 2012 BCPC 360, ***R. v. Kolebaba***, 2011 BCPC 1, ***R. v. Dejong***, 2005 BCPC 546, ***R. v. Merasty*** [2002] S.J. No. 586 (Sask. Prov. Ct.), ***R. v. Murphy*** 2010 NBPC 40.

[39] Judge Faulkner, in ***R. v. Elek***, [1994] YJ No. 31 (Yukon Territorial Court) explained the rational of the de minimis principle:

> 18. Minimal assaults are committed every hour of the day. People jostle on elevators, buses and in subways – not always entirely accidentally. One person touches another to gain the latter's attention. A man, uninvited, slaps his friend on the back to congratulate him. There are innumerable cases and circumstances in which physical contacts occur during day-to-day interactions between people. When these contacts are non-consensual, they technically constitute an assault. Leaving aside the argument that anyone attempting to board a subway in rush hour is implicitly consenting to the affray, one obvious reason that most of these cases do not end up in court is because of their minor nature. *De minimis non curat lex*: the law does not concern itself with trifles.

[40] After a review of cases, Judge Faulkner concluded:

> 24. In my view, much of the difficulty in applying the de minimis test is the usual translation: "The law does not concern itself with trifles". I think a much better way to approach the task is to ask whether or not the conduct of the accused is sufficiently serious that it should properly be stigmatized as criminal. I recognize that this is hardly more precise than speaking of the conduct as being trifling or trivial, but I think that the words trifling and trivial can convey a pejorative

message to the complainant which may not be warranted. An accused may be acquitted on de minimis grounds even though what happened is not considered by the court to be a "trifle", but is simply considered to be conduct that, while unacceptable and wrong, did not constitute criminal misconduct.

Conclusion

[41] C.C. clearly did not consider [redacted] contact with her to have been trifling or trivial. However, the contact was made in the course of day-to-day interaction between co-workers, was momentary in duration, and caused no physical injuries. While I am prepared to find that [redacted] touching of C.C.'s hips was ill-advised and not acceptable to C.C., I conclude that it did not constitute criminal misconduct. I find, therefore, that the Crown has not proved the *actus reus* of assault beyond a reasonable doubt, and I find [redacted] not guilty of assault.

Dated at the City of [redacted], Alberta this 18th day of February, 2016.

M.T.C. Tyndale
A Judge of the Provincial Court of Alberta

Appearances:

E. Frank
for the Crown

P. Fagan
for the Defence