IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)

Citation: *R. v. Kean*, 2013 NLTD(G) 137
Date: 20131016
Docket: 201208G0025

BETWEEN:

HER MAJESTY THE QUEEN

AND:

CLINTON KEAN

Restriction on Publication: The proceedings in this case are subject to an Order made under section 486.4 of the *Criminal Code* that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way.

Before: The Honourable Mr. Justice Robert P. Stack

Place of Hearing:	Wabush, Newfoundland and Labrador
Date(s) of Hearing:	September 16 – 18, 2013
Oral Decision and Written Reasons:	October 16, 2013
Summary:	Accused was charged with two counts of sexual assault and two counts of sexual interference against a 15 year old female. Complainant gave three highly contradictory statements to police. Complainant's admitted propensity to lie made it dangerous to convict. The charges were not proven beyond a reasonable doubt and were dismissed.
Appearances:	Mr. Tom Forsyth (September 16 to 18) and Ms. Jennifer Mercer (October 16) for the Crown

Mr. Mark Gruchy for the Accused

Authorities Cited:

CASES CONSIDERED: R. v. Chase, [1987] 2 S.C.R. 293, 45 D.L.R. (4th) 98; **R. v. Ewanchuk**, [1999] 1 S.C.R. 330, 169 D.L.R. (4th) 193; **R. v. P. (L.T.)**, (1997), 113 C.C.C. (3d) 42 (B.C.C.A.); **R. v. Lifchus**, [1997], 118 C.C.C. (3d) (S.C.C.); **R. v. Starr**, [2000] S.C.R. 144.

STATUTES CONSIDERED: *Criminal Code*, R.S.C. 1985, c. C-47, sections 150.1(1), 150.1(4), 151(a), 265(1)(a) and 271(1)(a).

REASONS FOR JUDGMENT

STACK, J.:

INTRODUCTION

[1] "Oh what a tangled web we weave, when first we practice to deceive!"; Sir Walter Scott's 200 year old warning should have been heeded by the complainant in this case. She became entangled in her own convoluted web of lies and consequently the Crown has not proven beyond a reasonable doubt that the accused committed one or more of the offences with which he is charged. Those charges are two counts of sexual assault pursuant to section 271(1)(a) of the *Criminal Code* and two counts of sexual interference pursuant to section 151(a) of the *Criminal Code*. The complainant was 15 years old at the time the offences are alleged to have occurred; the accused was 28 years old at the time.

[2] Evidence was heard from C.P. and the complainant for the Crown. The accused called no evidence as was his prerogative. Let us now make our way through the tangled web to see why the Crown has failed to prove that the accused committed any of the alleged offences.

THE LAW

[3] The essential elements of the crime of sexual assault are an assault committed in circumstances of a sexual nature such that the integrity of the victim is violated (**R. v. Chase**, [1987] 2 S.C.R. 293, 45 D.L.R. (4th) 98). Assault is the intentional application of force to another person, directly or indirectly, without that person's consent (*Criminal Code*, s. 265(1) (a)); for practical purposes, sexual assault involves a touching (**R. v. Ewanchuk**, [1999] 1 S.C.R. 330, 169 D.L.R. (4th) 193). Pursuant to s. 150.1(1) of the *Criminal Code*, consent is not a defence to a charge of sexual assault against a complainant under the age of 16 years, except in certain limited circumstances, none of which are applicable here. By s. 150.1(4), however, it is a defence that the accused believed that the complainant was at least 16 years old if he or she took all reasonable steps to ascertain the age of the complainant (the onus rests with the Crown to establish beyond a reasonable doubt that the accused did not take all reasonable steps to ascertain the complainant's age (**R. v. P. (L.T.)**, (1997), 113 C.C.C. (3d) 42 (B.C.C.A.)).

[4] The crime of sexual interference is committed by a person who touches, for a sexual purpose, any part of the body of a person under the age of 16 years, directly or indirectly, with a part of his or her body or an object. There is no consent component (because the complainant is, by definition, less than 16 years old) but the same defence of honest but mistaken belief as to age is available.

[5] The Crown must prove its case beyond a reasonable doubt and the burden never shifts to the accused. The standard is not absolute certainty (**R. v. Lifchus**, [1997], 118 C.C.C. (3d) (S.C.C.)). Proof beyond a reasonable doubt is, however, much closer to absolute certainty than to a balance of probabilities (**R. v. Starr**, [2000] S.C.R. 144).

[6] Jurisdiction, identity and the time frame identified in the indictment are all admitted (and are proven in any event).

FACTS

[7] The respective families of the complainant and accused were friends. He first met her when she was 13 years old while the two families were camping together. At the time of the alleged offences the complainant attended middle school. Consequently, there is ample evidence to establish that the accused knew how old the complainant was, so the defence of honest but mistaken belief as to age does not arise.

[8] As is common in these types of cases, this one turns on the credibility of the witnesses.

[9] The evidence of C.P. was unconvincing. He is a young man who is (or at least was) infatuated with the complainant. She describes him as her best friend. C.P. drove the complainant to court for the trial. His evidence was biased in favour of trying to support the allegations against the accused. Essentially, the court was left with the belief that at the relevant time he, the accused and the complainant were all friends. C.P. testified that the accused and the complainant were dating – this I believe because it is consistent with the complainant's evidence in this regard which I also believe. He also testified that the accused and the complainant both told him that they had sex; this may be so – it is, however, directly contrary to the evidence of the complainant; furthermore, even if the complainant said she had sex with the accused it does not prove beyond a reasonable doubt that she did – that determination will have to be made within an assessment of the evidence as a whole. C.P. also testified that the accused showed him a gold condom wrapper and a condom that the accused said were used having sex with the complainant – I believe that the accused may have done so but this does not prove the offence; aside from the issue of hearsay, C.P. admitted that the accused was prone to false bragging and exaggeration – so although the accused may have claimed that the condom C.P. saw was used for sex with the complainant, it does not prove it; furthermore, the brand of condom shown to C.P. was not the same as the one that the complainant testified was used.

[10] C.P.'s evidence was undermined by his refusal to say how he got involved in this matter and how it came about that he gave a statement to the police – not coincidentally the same day that the complainant provided her third statement. This was not a mere matter of forgetfulness. The court was left with the clear impression that C.P. did not want to disclose how he became involved in the criminal charges alleged by the complainant against the accused.

[11] The principal value of C.P.'s evidence, therefore, was to provide general corroboration for the complainant's description of the time and place of the allegations and the complainant's relationship with the accused.

[12] The evidence of the complainant was given in a clear and unemotional manner. She appears, at first glance, to be believable. The principal challenge to her credibility and reliability is, however, that she provided three statements to the police that differed fundamentally. She readily admits that the first two were rife with untruths. She admittedly showed great skill in spinning her lies, being careful to add, subtract or modify details to enhance their credibility. Having told so many lies, what confidence can the court have that anything she said was true?

[13] It was established that the events in question happened in April of 2010. In May of that year the complainant gave her first statement to the police. In it she alleged that the accused had kissed her on the forehead and cheek and hugged her. More damning, she said that while hugging her when they were alone in his truck, he tried to put his hand down the back of her pants. She stopped him just after he got into her waistband.

[14] Shortly after giving the first statement, the complainant moved, or was moved, from Labrador to the island of Newfoundland. This was, understandably, disruptive for her because she left behind her family and friends. While on the island she learned that the accused was becoming friendly with other girls who had been friends with her. Ostensibly to protect them and to "have the accused put away for as long as possible", she gave a second statement to the police in September of 2010. In it she claimed that the accused forced sexual intercourse on her despite her protestations and struggles to the contrary.

[15] During the next several months the complainant had second (third?) thoughts. She decided to recant her allegation of rape and in April of 2011 told the police essentially the same story that she related at trial.

[16] According to the complainant, by April of 2010 the accused was picking her up at school for lunch every day. One day they went alone to the end of the runway in his truck and parked. The accused asked her to come closer and so she sat in his lap. He put his hand down the front of her pants and touched her inner thigh under her clothes. She told him to stop and he did.

[17] The complainant also disclosed that closer to the end of April, 2010, she called the accused at recess as usual and he told her to come alone at lunch time. They again went in his truck to the end of the runway. They sat smoking and talking. The accused reached into the glove box and pulled out a condom in a purple wrapper. He made a gesture signifying "Do you want to?" to which she responded "Yes. Sure". They climbed into the back seat and he unzipped her jacket. She said she wanted to keep it on but he said that clothing was not an option. So she took off her jacket, t-shirt, pants and panties but kept on her tank top and bra. The accused asked her to perform fellatio; she said she did not want to but then did anyway. After a minute she stopped because she did not like it. They then had consensual sexual intercourse. They stopped because the condom broke. The accused did not ejaculate.

[18] Each of the statements, and their respective untruths, has a certain basis in logic. None of it reflects well on the complainant. The first statement had the convenient effect of getting the accused into some trouble with the law while at the same time minimizing the complainant's involvement in the sexual activity. Although the complainant's motivation for alleging inappropriate conduct by the accused is unclear, this version of events preserved what the complainant wished her parents and others to think of her sexual integrity – it served to protect her reputation.

[19] The second statement makes logical sense if viewed in the context of a teenaged girl about whom it became known to others (parents or friends and

whether true or not) that she had sex with an older man (or in some other circumstance that she has come to regret). Rather than be thought to be a "slut or a whore" – her words – the complainant decided that the best defence would be a strong offence. So the complainant claimed rape – that way she could not be held morally responsible for having had the sexual encounter. Both the first and second statements to the police were designed to preserve the complainant's reputation – something that was very important to her. The second had the added benefit of potentially inflicting greater consequences on the accused, something that the complainant came to desire during her exile to Newfoundland.

[20] The third statement to the police is the most problematic. The challenge faced by the court is to understand why the complainant changed her story from the second account? Perhaps she would have gotten away with it and her lies would not have been discovered. It appears that her motivation to recant had two possible basis – first, by this time she says her parents had come to grips with her sexual activity, whether non-consensual or otherwise, so the charade was no longer strictly speaking necessary to preserve her reputation; and second, the consequences of carrying her lies into the courtroom began to weigh on her and she did not want to get herself deeper into trouble.

[21] The cross-examination of the complainant focused principally on the disparity among the versions of events contained in the three statements. These are obvious and are admitted by the complainant. That is, she freely admits that she lied in each of the first two. The second, however, except as to the allegation of rape and some peripheral details, describes fairly closely the allegation in the third statement as to consensual sex. The accused urged the court to conclude that because the complainant told so many lies, everything that she said was a lie. That is, the testimony of the complainant was entirely void of credibility and reliability. Although the court may accept all, some, or none of a witness's testimony and may accord different weight to different parts of the evidence that it has accepted, the court agrees with counsel for the accused that it would be dangerous to convict this accused based upon inconsistent allegations made by an admitted habitual and skilled liar such as the complainant.

[22] Although counsel for the accused did not seriously shake the complainant's allegation of the sexual intercourse in which she and the accused engaged and, in fact, at no point put to her that her allegation of sexual intercourse was false, the court is still not satisfied beyond a reasonable doubt that the sexual intercourse occurred. It is not enough that the court believes that sexual contact between the accused and the complainant probably or likely took place – it must be sure that it did. Based upon the entirety of the complainant's testimony, the court is left with a reasonable doubt. Let me explain why.

[23] At the trial, the complainant denied telling any of her friends that she had consensual sex with the accused. Yet, in her second statement to the police she said that she did. Furthermore, C.P. testified that she told him on four or five occasions that she had sex with the accused. One of them is not telling the truth.

[24] The complainant admitted that even though she found the accused to be immature and annoying, she went out with him for the prestige that dating a 28 year old would bestow upon her among her peers. It is possible that she was able to resist sexual contact with him while at the same time telling her peers that they engaged in sex acts – one of the many lies that she would later come to regret. Although not the most likely scenario, this possible alternative explanation for the allegations in the third statement is sufficient to root a reasonable doubt.

[25] Even though, other than the allegation of rape, there was consistency among the complainant's accounts in her second and third statements and her testimony at trial, that does not make them believable. The complainant admitted being a habitual liar, including to her parents. Furthermore, she was a successful liar who, without advance planning, was able to embellish a fabrication with detail to make it seem more believable. Certainly, the police believed her accounts and acted on them.

[26] Although for the most part the complainant held up well against the onslaught of cross-examination that her web of deceit had brought upon herself and she freely admitted some of her lies, she was unable to explain some of the inconsistencies between her evidence at the preliminary inquiry and that at trial.

For example, there was reference to a possible "hand-job" that she may have given the accused or possibly told people about. Her testimony in this regard was the classic case of the liar's dilemma – she would not provide an answer until she had satisfied herself as to what was proven that she had said and even at that she was unable to give a cohesive explanation. On occasion she retreated to the liar's base camp of feigning lack of memory of matters altogether, particularly as to the allegations in her first statement. The issue, as put by the accused's counsel to the complainant during cross-examination, was not so much what she said had happened but what had actually happened. Because, however, the truth had become so completely entangled in her web of lies, the complainant could no longer differentiate between the two. It became impossible, therefore, to distinguish between when the complainant lied, lied about lying, or told the truth.

[27] This complainant decided to place herself in a relationship that was inappropriate for a 15 year old. Once it began it is unclear who was the more manipulative – she or the accused. One may strongly suspect that there was sexual activity between the accused and the complainant; that is, one may think that there probably or likely was. Her allegations are, however, simply too convoluted to amount to proof beyond a reasonable doubt. In total, her stories, when subject to comparison, were too full of contrasts and conflicts to be believable. The court has not been satisfied that sexual intercourse between the accused and the complainant has been proven beyond a reasonable doubt.

[28] Nor has the Crown met its onus with respect to the lesser allegations. In particular, the allegation that the accused put his hand down the front of the complainant's pants and touched her inner thigh has not been proven. In her first statement to the police, she alleged that he put his finger down the back of her waist band just beyond the first knuckle. At the preliminary inquiry and on direct examination at trial she testified he put his hand down the front of her pants and touched her inner thigh. He did not go inside her underwear. On cross-examination, however, she was unclear as to whether he put his hand "towards" her thigh but she was able to have him desist, or whether he actually got his hand on her thigh. She then tried to assert that they amounted to the same thing; they do not. The sum of the many inconsistencies in the complainant's story as a whole means that this alleged offence has not been proven beyond a reasonable doubt.

[29] The allegations of kissing, which if in circumstances of a sexual nature or for a sexual purpose would be a crime against a 15 year old, have not been proven beyond a reasonable doubt. The complainant at various times spoke of comforting gestures from the accused, including kisses on the forehead, cheek and lips, as well as hugs. She testified on cross-examination that any kisses by him were not "intimate". C.P. stated that the accused would also hug him in a comforting manner. Consequently, the court finds that that the hugs and kisses have not been proven to amount to a sexual offence.

[30] To the extent that C.P. testified that he witnessed other sexual conduct between the accused and the complainant, because these acts were not alleged by the complainant herself they cannot form the basis for conviction in light of my concerns about C.P.'s bias in the complainant's favour.

DISPOSITION

[31] The charges of sexual assault and sexual interference against the accused are dismissed.

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ROBERT P. STACK
Justice