
CANADA / JUDGMENT

R. v. Campbell

2017 BCSC 888

COURT

Supreme Court of British Columbia

DECIDED

30 May 2017

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2017 BCSC 888 R. v. Campbell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Campbell,

2017 BCSC 888

Date: 20170530

Docket: 27111

Registry: Vancouver

Regina

v.

Bradley Johnny Campbell

Before: The Honourable Madam Justice Maisonville

On appeal from: A decision of the Judge of the Provincial Court of British Columbia, June 9, 2015
(North Vancouver Registry Action 60869-2-C)

Reasons for Judgment

Counsel for the Crown:

E.A. Wolfram

Counsel for the Accused/Appellant:

H.A. Lucky

Place and Dates of Hearing:

Vancouver, B.C.

February 15 and March 23, 2017

Place and Date of Judgment:

Vancouver, B.C.

May 30, 2017

INTRODUCTION

- [1] On June 9, 2015, the appellant, Mr. Bradley Johnny Campbell, was convicted at the Provincial Court of British Columbia at Squamish, British Columbia of three charges for which the Crown was proceeding summarily. He was convicted of sexual assault of A.M., contrary to s. 271 of the Criminal Code, R.S.C. 1985, c. C-46, touching A.M. for a sexual purpose, contrary to s. 151 of the Criminal Code, and invitation to a person under the age of 16 to sexually touch his person, contrary to s. 152 of the Criminal Code. The offences were alleged to have occurred on July 21, 2014.
- [2] Mr. Campbell is appealing his convictions which were registered on Count 2 and 3. A conditional stay of proceedings was registered respecting Count 1. The trial of the matter comprised of a number of days but took out one day for the evidence of four boys, A.M., N.S., C.R., and M.K.

overview

- [3] Four teenage boys were friends and had met the evening of July 21, 2014 at the Burger King restaurant in Squamish, B. C., sometime between 8:30 p.m. and 9 p.m. A.M., N.S. and C.R. were 15 years of age. M.K. was 16. While the boys were seated in a booth in the restaurant, the appellant approached them and started to talk to them. He had clearly been consuming alcohol. He stood behind the back wall of one side of the booth behind two of the boys. While initially the encounter struck the boys as a joke, it changed and became sexually explicit with questions being posed by the appellant.
- [4] He asked A.M. how much it would cost to spend the night with him. While asking this question, he began stroking A.M.'s shoulder. A.M. moved away from the appellant. The actions form the substance of Count 1, the sexual assault contrary to s. 271 of the Criminal Code, and Count 2, the touching for a sexual purpose, contrary to s. 151 of the Criminal Code.
- [5] The boys left the Burger King restaurant when the restaurant was closing and went across the street to the parking lot between Tim Hortons and the Canadian Imperial Bank of Commerce.

- [6] The appellant, who was on a bicycle, followed the boys who had by then split into two groups. The appellant approached them and began talking to them. A.M. and C.R. walked away to call the police. The appellant then said to N.S., "I'll give you two joints if you have sex with me over there", gesturing to an area behind Burger King.
- [7] Following the convictions by the Provincial Court Judge, the convictions were registered touching for a sexual purpose, Count 2, and invitation to sexually touching, Count 3.
- [8] A judicial conditional stay of proceedings was entered on Count 1 pursuant to R. v. Kienapple, [1975] 1 S.C.R. 729.

the evidence at trial

Incident involving A.M.

- [9] In the Reasons for Judgment of the Provincial Court Judge, the following facts were found. That on July 21, 2014, four teenage boys met around 9:30 p.m. at the Burger King restaurant in Squamish, British Columbia. A.M., N.S. and C.R. were aged 15 and M.K. was aged 16.
- [10] They ordered food and sat in a booth. Then Mr. Campbell came in.
- [11] Also in the restaurant was a table of three patrons. Staff were present as well.
- [12] The trial judge found that "Mr. Campbell was clearly intoxicated. He had trouble with his balance, he was rambling in his speech and said some things that did not make sense to the boys."
- [13] The trial judge continued at para. 3 of the Reasons for Judgment:
- A.M. testified that Mr. Campbell said "Which one of you boys is the man?" A.M. replied "C.R. is the man." They were joking with someone obviously intoxicated, but then A.M. testified that it got sexual. Mr. Campbell asked C.R. if he had had a girlfriend and if he did if he had anal and if it was tight. A.M. testified he felt the conversation was getting a bit strange or weird.
- [14] The tenor of the interaction had changed, the trial judge noted. A.M. testified that "no longer did it feel like it was some drunk person messing with them, but that he wanted something".
- [15] The conversation with Mr. Campbell continued to vacillate between being joking and then sexual with the boys unable to discern what was going on. Then Mr. Campbell asked which one of the boys was "the slut". A.M. was singled out by his friends in a joking way. However, Mr. Campbell who was standing behind A.M. on the outside of the booth then rubbed A.M.'s shoulder and asked him "how much he wanted for a night."
- [16] One of A.M.'s friends then yelled "a thousand dollars", whereupon Mr. Campbell then said, "Fuck you; I'll give you two dollars." The trial judge found at para. 4 of the Reasons for Judgment:

A.M. testified that Mr. Campbell wanted to get somewhere sexually with one of the group or with him. He moved away from the touch. The touch lasted a few seconds and A.M. said he felt very uncomfortable and wanted to leave the building. The restaurant was closing at around 10 and they were asked to leave around the same time.

[17] The trial judge found that the entirety of the incident took about 30 minutes at the Burger King restaurant. Following the closing of the Burger King restaurant, the boys left the building and went across the street. The trial judge stated at para. 5 of the Reasons for Judgment:

Mr. Campbell they saw got on his bike and wobbled towards them following them. The police were called.

Incident involving N.S.

[18] The trial judge found that N.S.'s evidence was similar to that of A.M.

[19] N.S. also added, however, that Mr. Campbell said he would "drop kick our jaws" and he, while not feeling threatened, was nervous and felt that Mr. Campbell was offering sex, saying he was gay and touching A.M.

[20] The trial judge continued at para. 7 of the Reason for Judgment:

After they left the Burger King and were in the parking lot, Mr. Campbell swerved over on his bike slowly and it was clear that he was not in very much control of the bike.

[21] N.S. said that he was worried that Mr. Campbell would be hurt in the traffic or he would follow them home, or he would assault them.

[22] The trial judge found while across the street and while A.M. and C.R. were moving away to call the police, Mr. Campbell said to N.S., "I'll give you two joints if you have sex with me over there", motioning to a location behind the Burger King.

[23] The trial judge noted at para. 8 of the Reasons for Judgment that N.S. took Mr. Campbell seriously and then:

N.S. agreed that Mr. Campbell appeared drunk and at one time said that he was Brad Pitt and that there was a lot of rambling conversation.

[24] At para. 9 of the Reasons for Judgment, the trial judge noted:

Mr. Campbell looked directly at him from about two to three feet away when the offer of drugs for sex was made.

C.R. Evidence

[25] C.R. testified that he could smell a faint order of liquor on Mr. Campbell's breath. His evidence was similar to the other boys. At para. 10 of the Reasons for Judgment, the trial judge noted:

C.R. agreed that Mr. Campbell was drunk, but not to the point of blacking out.

M.K. Evidence

[26] The trial judge found that M.K.'s testimony was largely consistent with the evidence of the other boys as well. At para. 11, the trial judge wrote:

He described, as well, the comments of being Brad Pitt, of asking how much for a night of sex and that he had a bag full of condoms and wanted to use them, and asking "How much do you charge for a night?" and then touching A.M. M.K. could not recall who the comment about marihuana and to whom "letting you come back to my place" was directed at, but believed that it was to A.M.

The Arresting Officer Evidence

[27] The evidence of the arresting officer was tendered by admission. Mr. Campbell was arrested at 10:10 p.m., read his s. 10(a) Charter rights to which responded "Yup". Mr. Campbell was also read his s. 10(b) Charter rights to which he responded, "No, not right now. I will later." The trial judge, at para. 12, noted:

He was lodged in the cells at around 10:40 p.m. The constable noted liquor on his breath, slurred speech and slightly wobbly balance with an incoherent train of thought.

Evidence of the Defence

[28] The appellant gave evidence at trial. He testified that he was 49 years of age and had lived in Squamish for two years. He testified that he had no memory of the events described by the boys and that his memory was of waking up in the drunk tank and that he was shocked when he was told of the charges. His evidence was that he had been drinking for two days with a new friend.

[29] By his evidence, he had consumed eight cans of beer, smoked half a joint of marijuana, and saved the other half. He as well testified that he takes Tylenol 3s because of pain from a broken clavicle and alcohol has been a problem for him in the past.

[30] He testified that after drinking with his friend, they got into an argument and he left and he did not recall the rest of that evening.

[31] The trial judge found at para. 15 of the Reasons for Judgment:

[15] In *R. v. Chase*, [1987] 2 S.C.R. 293, the Supreme Court of Canada found that sexual assault is an assault within any of the definitions of s. 265(1) committed in circumstances of a sexual nature such that the sexual integrity of the victim is violated. The test is an objective one to be viewed in light of all the circumstances. Is the sexual or carnal contact of the assault visible to a reasonable observer. One must look to the part of the body touched, the nature of the contact and the situation in which it occurred, the words and gestures accompanying the act and all other circumstances surrounding the conduct. The offence is one of general

intent only.

- [32] In respect of the sexually explicit conversation, the Crown's position was that the touch in combination with that sexually explicit conversation made up the offence of sexual assault, rather than a simple assault as submitted by the defence.
- [33] With respect to the sexual assaults, the trial judge found the Crown had proven the case beyond a reasonable doubt at para. 23:
- [23] These cases all turn on their facts, as is clear by *R. v. Chase* and are very different than the facts at bar. It is clear on the evidence here that there was some escalating sexual conversation by the accused with these teenagers who were unknown to him. As he touches A.M. it is in conjunction with the words of "How much for a night," "I want to take you home," and "\$2 for sex." There is really no other conclusion to be drawn other than that the touching occurred in circumstances that were sexual in nature. They would be seen to be by any reasonable bystander. Certainly all four boys saw it that way, not just A.M. It was intentional, there was no consent given and it was sexual in nature within the overall context. I therefore find that the Crown has proven the sexual assault beyond a reasonable doubt.
- [34] Respecting the sexual touching, contrary to s. 151 of the Criminal Code and invitation to sexual touching, contrary to s.152 of the Criminal Code, the trial judge found at paras. 24 and 25:
- [24] In Count 2, the touching for a sexual purpose, that requires specific intent. Crown must prove the touching to be for a sexual purpose. The actions and words of Mr. Campbell speak to his purpose. His lack of memory, in my view, is not determinative. He came up to the boys, touched A.M. after words clearly of a sexual nature were spoken and clearly intended for a sexual purpose. The circumstances and context clearly establish his sexual purpose.
- [25] In Count 3 the sexual purpose is even clearer. He follows them across to the Tim Hortons, he continues to engage in sexual discussion and then says directly to N.S., "I'll give you two joints if you have sex with me over there." The evidence could not be much clearer of an Invitation to N.S. to touch the body of the accused and I accept the evidence of N.S.
- [35] Respecting the defence of intoxication, the trial judge found at para. 26:
- [26] Defence submits that his level of intoxication would raise a reasonable doubt as to the specific intent required. While it is true that Mr. Campbell was described as loud and rambling and incoherent train of thought and slurring at times, he was able to communicate with the officer, he was able to communicate with the boys and he was able to ride his bicycle in laps around the building. This case is significantly than [sic] *R. v. Bone*. There the accused was so drunk that he could not be roused until after a fourth attempt to do so. The fact that he has no memory of the events does not by itself raise a reasonable doubt as to the specific intent required here.

procedural issue

- [36] Given that an appeal may be brought pursuant to s. 813(a)(i) of the Criminal Code from a conviction or an order made against an appellant, an appellate court does not have the jurisdiction to entertain an appeal from a verdict on charge which has been conditionally stayed.
- [37] In the case at bar, conviction for sexual assault has been conditionally stayed.
- [38] An appellate court, however, has jurisdiction to deal with conditionally stayed matters, pursuant to s. 686(8) of the Criminal Code, which permits any ancillary orders to be made which are in the interests of justice. Pursuant to s. 686(8) of the Criminal Code, the appellate court has broad ancillary jurisdiction to allow an appeal of any order in addition that justice requires: see *R. v. Foti*, [1994] M.J. No. 23 (C.A.) at paras. 4-6 and *R. v. Ostojic*, [2009] O.J. No. 3909 (S.C.J.) at paras. 7-11.
- [39] If the appellate court dismisses the conviction appeal, then no ancillary order is required: see *R. v. Provo*, [1989] 2 S.C.R. 3 at 16.
- [40] If the appellate court allows the conviction appeal and the court orders a new trial on the counts under appeal, then, through an ancillary order pursuant to s. 686(8), the appellate court may set aside any conditional stay entered on a Kienapple charge if the successful ground of appeal is also applicable to it: see *Foti* at para. 10.
- [41] However, if the appeal with respect to the charges on which the conviction were registered is dismissed but the court directed a conditional stay, the stay would be returned to the Provincial Court for the conviction to be registered and to enable the appellant to have a means to appeal his conviction.
- [42] The appellate court also has the ability under s. 686(8) to enter an acquittal on a conditionally stayed charge: see *R. v. Willoughby*, 2012 ONSC 3139 at para. 51, being an appeal of an impaired driving charge of driving while over the legal limit of .08.
- [43] Accordingly, the Court must first determine the appeals of the convictions on Counts 2 and 3.

the Issues with respect to counts 2 and 3

- [44] The appellant, frames the issues as follows:
- i) the learned trial judge erred by finding that the conduct of the appellant was for a sexual purpose, as required by s. 151 of the Criminal Code;
 - ii) the learned trial judge erred by finding that the appellant formed the specific intent mens rea, as required by ss. 151 and 152 of the Criminal Code.
- [45] Section 151 of the Criminal Code provides as follows:

151 Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years

- (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or
- (b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of 90 days.

[46] Section 152 of the Criminal Code provides as follows:

152 Every person who, for a sexual purpose, invites, counsels or incites a person under the age of 16 years to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the person under the age of 16 years,

- (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or
- (b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of 90 days.

[47] Respecting the issue of sexual assault by the appellant, the trial judge relied on *R. v. Chase*, [1987] 2 S.C.R. 293, which sets out the analysis the court is to follow at 302-303 respecting assessing the nature of the assault and the intent required:

Applying these principles and the authorities cited, I would make the following observations. Sexual assault is an assault within any one of the definitions of that concept in s. 244(1) of the Criminal Code which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: "Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer" (*[R. v.] Taylor [(1985), 44 C.R. (3d) 263]*, per Laycraft C.J.A., at p. 269). The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant (see S.J. Usprich, "A New Crime in Old Battles: Definitional Problems with Sexual Assault" (1987), 29 *Crim. L. Q.* 200, at p. 204.) The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence, it may be a factor in determining whether the conduct is sexual. It must be emphasized, however, that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances.

Implicit in this view of sexual assault is the notion that the offence is one requiring a general intent only. This is consistent with the approach adopted by this Court in cases such as *Leary v. The Queen*, [1978] 1 S.C.R. 29, and *Swietlinski v. The Queen*, [1980] 2 S.C.R. 956, where it was held that rape and indecent assault were offences of general intent. I am unable to see any reason why the same approach should not be taken with respect to sexual assault. The factors which could motivate sexual assault are said to be many and varied (see *C. Boyle, Sexual Assault* (1984), at p. 74). To put upon the Crown the burden of proving a specific intent would go a long way toward defeating the obvious purpose of the enactment. Moreover, there are strong reasons in social policy which would support this view. To import an added element of specific intent in such offences, would be to hamper unreasonably the enforcement process. It would open the question of the defence of drunkenness, one which has always been related to the capacity to form a specific intent and which has generally been excluded by law and policy from offences requiring only the minimal intent to apply force (see *R. v. Bernard* (1985), 18 C.C.C. (3d) 574 (Ont. C.A., per Dubin J.A.)) For these reasons, I would say that the offence will be one of general rather than specific intent.

[48] Here, in respect of ss. 151 and 152 of the Criminal Code, the appellant argues that the test in respect of touching for a sexual purpose is different than sexual assault. It is argued that the learned trial judge erred by finding that the appellant had the specific intent mens rea required by ss. 151 and 152 of the Criminal Code and further that the touching of A.M. was for a sexual purpose as required by s. 151 of the Criminal Code. The reasoning is not found in *Chase*, given the specific intent requirement.

[49] The appellant argues that the verdict is unreasonable and relies upon *R. v. Biniaris*, 2000 SCC 15 at paras. 36-37:

[36] The test for an appellate court determining whether the verdict of a jury or the judgment of a trial judge is unreasonable or cannot be supported by the evidence has been unequivocally expressed in *[R. v.] Yebes*, [[1987] 2 S.C.R. 168] as follows:

[C]urial review is invited whenever a jury goes beyond a reasonable standard ... [T]he test is 'whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered'.

(*Yebes*, supra, at p. 185 (quoting *Corbett v. The Queen*, [1975] 2 S.C.R. 275, at p. 282, per Pigeon J.).)

That formulation of the test imports both an objective assessment and, to some extent, a subjective one. It requires the appeal court to determine what verdict a reasonable jury, properly instructed, could judicially have arrived at, and, in doing so, to review, analyse and, within the limits of appellate disadvantage, weigh the evidence. This latter process is usually understood as referring to a subjective exercise, requiring the appeal court to examine the weight of the evidence, rather than its bare sufficiency. The test is therefore mixed, and it is more helpful to articulate what the application of that test entails, than to characterize it as either an objective or a subjective test.

- [37] The Yebes test is expressed in terms of a verdict reached by a jury. It is, however, equally applicable to the judgment of a judge sitting at trial without a jury. The review for unreasonableness on appeal is different, however, and somewhat easier when the judgment under attack is that of a single judge, at least when reasons for judgment of some substance are provided. In those cases, the reviewing appellate court may be able to identify a flaw in the evaluation of the evidence, or in the analysis, that will serve to explain the unreasonable conclusion reached, and justify the reversal
- [50] In assessing whether a verdict is reasonable, the Court must review, analyze and, to a limited extent, weigh the evidence. However, it is not an appellate court's role to retry the case or substitute its views of the evidence for that of the trial judge: see *R v. M.B.*, 2006 BCCA 465 at para. 6.
- [51] The starting point is one of deference to the trial judge and, absent palpable and overriding error by the trial judge, "his or her perceptions should be respected": see *R. v. Gagnon*, 2006 SCC 17 at para. 20.
- [52] Accordingly, to succeed in an argument under s. 686(1)(a)(i) of the Criminal Code, Mr. Campbell must establish that the verdict was not one that the trial judge could reasonably have rendered. The appellate court may also find a verdict unreasonable if the trial judge drew an inference or made a finding of fact essential to the verdict that is either plainly contradicted by the evidence relied upon by the trial judge in support of that inference or finding, or is shown to be incompatible with the evidence that has not otherwise been contradicted or rejected by the trial judge: see *R. v. R.P.*, 2012 SCC 22 at para. 9.
- [53] The scope of review under 686(1)(a) is limited because of the "special position of the trier of fact on matters of credibility": see *R. v. Ceal*, 2012 BCCA 19 at para. 23 and *Biniaris* at para. 36.
- [54] Both counsel agree ss.151 and 152 of the Criminal Code are specific intent offences. The question here is whether the learned trial judge erred in finding that the appellant formed the specific intent mens rea required by ss. 151 and 152, given that intoxication may raise a reasonable doubt as to the required mens rea for a specific intent offence. Crown counsel, however, argues that the reasoning is apt here and applies when assessing the nature of the impugned conduct.
- [55] Crown Counsel agrees that intoxication may raise a reasonable doubt as to the required mens rea for a specific intent offence. The issue is whether the learned trial judge erred in his determination that Mr. Campbell's level of intoxication was not so high that it negated the requisite special intent. The question becomes for the Court to decide whether the trial court's decision was available based on the evidence in the trial.

[56] Mr. Campbell argues that intoxication is a relevant consideration as it can negate the required mens rea component. All four boys testified and the trial judge found that Mr. Campbell was intoxicated. The question is whether the level of intoxication is such as to negate the specific intent required for conviction. Defence counsel on behalf of Mr. Campbell submitted that Mr. Campbell was too intoxicated to have the specific intent required for ss. 151 and 152 of the Criminal Code.

[57] The trial judge relied upon the case of *R. v. Bone*, [1993] M.J. No. 222 (C.A.), in respect of the intoxication defence. In *Bone*, the complainant was an 11-year-old girl staying at her sister's home overnight. She slept on a mattress in her young niece's bedroom. She woke up one night to find the accused lying down beside her. The accused attempted to hug and kiss her, to get on top of her and remove her underpants. She resisted those efforts and was able to leave the room, but not before the accused said that he would kill her if she told anyone.

[58] In *Bone*, respecting drunkenness, the court held:

Drunkenness is never a defence to a criminal charge. It may, however, render the perpetrator of what otherwise would be a crime incapable of forming the necessary intent. Or, if the perpetrator had capacity, it may be a factor in determining whether he actually formed the intent: see *R. v. Crane* (Man. C.A., judgment delivered April 27, 1993.) The governing factor is the nature of the intent required.

[59] The court in *Bone* noted the state of impairment of the appellant as follows:

The accused then fell asleep while the victim escaped to the living room. Her sister was temporarily absent. When the sister returned, she went into the children's bedroom and attempted to awaken the accused. Her attempt failed, as did the attempt of another adult in the house and that of her husband. It was only on the fourth attempt to wake him that the sister, grabbing him by the arm, succeeded.

[60] Similar to the case at bar, the appellant in *Bone* gave evidence that he had been heavily drinking for several days. He was also having blackouts and that he could not even recall being at the residence.

[61] The court in *Bone* concluded:

The accused's drunkenness was a factor which should have been taken into account. The failure of the trial judge to do so necessitated at least a new trial.

[62] Here, the appellant similarly gave evidence, which was accepted by the trial judge of the fact that he had no memory of the events. Accordingly, given that evidence, the trial judge accepted that the appellant was intoxicated. The issue became whether that raises a reasonable doubt as to the specific intent required.

[63] With respect to the level of intoxication, the learned trial judge in the case at bar noted at para. 26 of the Reasons for Judgment (in part):

[26] While it is true that Mr. Campbell was described as loud and rambling and incoherent train of thought and slurring at times, he was able to communicate with the officer, he was able to communicate with the boys and he was able to ride his bicycle in laps around the building.

There is no issue here that drunkenness was considered by the trial judge. The question is how intoxicated was the accused. The trial judge considered the issue.

[64] The learned trial judge distinguished the Bone decision of the Manitoba Court of Appeal on the basis of the accused in Bone was so intoxicated that he could not be waken up until four attempts. In Bone, the appeal, was as well, conceded by the Crown:

The learned trial judge erred in treating both offences as ones of general intent. The accused's drunkenness was a factor which should have been taken into account. The failure of the trial judge to do so necessitated at least a new trial.

[65] The Crown's concession in Bone relieved the Manitoba Court of Appeal from having to decide whether new trial should be ordered or an acquittal entered: "In the circumstances, the only course was to set aside the convictions and direct that acquittals be entered in their place."

[66] In the case at bar, while the respondent Crown agrees that intoxication may raise a reasonable doubt respecting the mens rea for the specific intent offence, it is argued that the level of intoxication was not such that he did not have the requisite specific intent.

[67] To provide a defence, the Crown submits the evidence must establish "advanced" intoxication to the point where the accused lacked specific intent.

[68] In connection with cases considering the level of intoxication, the Crown relies upon *R. v. Daley*, 2007 SCC 53 at paras. 40 and 41:

[40] Thus, on the current state of the law, for a murder charge, the defence of intoxication will only be available to negate specific intent so as to reduce the charge to manslaughter. The degree of intoxication capable of raising a reasonable doubt about whether the accused lacked specific intent was discussed by this Court in *R. v. Robinson*, [1996] 1 S.C.R. 683. That case considered the legitimacy of the third proposition in [*Director of Public Prosecutions v. Beard*, [1920] AC 479], which refers to evidence of intoxication that would render the accused incapable of forming specific intent in order to make out the defence. This proposition was interpreted by many courts to require the trier of fact to have a reasonable doubt about whether the accused was capable of forming an intent, whereas general mens rea principles would suggest that the actual intent, not capacity for intent should be the issue. In *Robinson*, the Court held that the *Beard* rules violated ss. 7 and 11(d) of the Charter because they required the jury to convict even if they had a reasonable doubt about the accused's actual intent. An accused who was not so intoxicated as to lack capacity to form the intent may nevertheless not have exercised that capacity and formed the specific intent. The ultimate inquiry is always whether the accused possessed actual intent.

[41] Our case law suggests there are three legally relevant degrees of intoxication. First, there is what we might call "mild" intoxication. This is where there is alcohol-induced relaxation of both inhibitions and socially acceptable behaviour. This has never been accepted as a factor or excuse in determining whether the accused possessed the requisite mens rea. See [R. v.] Daviault, [[1994] 3 S.C.R. 63] at p. 99. Second, there is what we might call "advanced" intoxication. This occurs where there is intoxication to the point where the accused lacks specific intent, to the extent of an impairment of the accused's foresight of the consequences of his or her act sufficient to raise a reasonable doubt about the requisite mens rea. The Court in Robinson noted that this will most often be the degree of intoxication the jury will grapple with in murder trials:

In most murder cases, the focus for the trier of fact will be on the foreseeability prong of s. 229(a) (ii) of the Criminal Code, R.S.C., 1985, c. C-46, that is, on determining whether the accused foresaw that his or her actions were likely to cause the death of the victim. For example, consider the case where an accused and another individual engage in a fight outside a bar. During the fight, the accused pins the other individual to the ground and delivers a kick to the head, which kills that person. In that type of a case, the jury will likely struggle, assuming they reject any self-defence or provocation claim, with the question of whether that accused foresaw that his or her actions would likely cause the death of the other individual. [para. 49]

A defence based on this level of intoxication applies only to specific intent offences.

[69] The degree of intoxication to negate specific intent was also considered by the Supreme Court of Canada in R. v. Robinson, [1996] 1 S.C.R. 683 at para. 83:

[83] At the same time, the Court held in Daviault that, for offences of general intent, evidence of intoxication can only be considered in situations of extreme intoxication akin to automatism. This limitation is based on the fundamental distinction between offences of general and specific intent. The category of general intent offences is defined by the fact that such offences require only "the minimal intent which characterizes conscious and volitional conduct": [R. v.] Bernard, [[1988] 2 S.C.R. 833], per Wilson J. at p. 889. A distinguishing feature of such offences is that the mens rea is so basic that it will not be affected by intoxication, unless the degree of intoxication is so extreme as to verge on automatism. By definition, specific intent offences do not share this feature. There is no reason to assume that the existence of the mens rea required for a specific intent offence might not be affected by intoxication, even if the degree of intoxication falls short of automatism and does not deprive the accused of the capacity to form the specific intent. Consequently, for specific intent offences, the requirements of ss. 7 and 11(d) recognized in Daviault mean that the trier of fact should be permitted to consider evidence of intoxication in determining whether the accused actually had the requisite intent.

- [70] The ultimate inquiry the Court notes is always whether the accused possessed actual intent. In *Robinson*, the Court held that the rules in *Director of Public Prosecutions v. Beard*, [1920] AC 479, violated ss. 7 and 11(d) of the Charter because they required the jury to convict even if there was a reasonable doubt about the accused's actual intent.
- [71] The Crown additionally relied upon *R. v. Hartridge*, [1967] 1 C.C.C. 346 (S.K.C.A.) as authority for the proposition that a having a blackout does not necessarily mean that there will be a lack of intent to a specific intent offence. It is but one factor in estimating the degree of the accused drunkenness as it relates to a capacity to form the requisite intent. The Crown further argues that the Court can look to the actions and words of the appellant himself and analyze notwithstanding intoxication requisite intent is established on the evidence.
- [72] The trial judge had noted that Mr. Campbell was "clearly intoxicated". He had trouble with his balance, he was rambling in a speech and had said something that made no sense to the boys. However, the trial judge noted that Mr. Campbell quickly steered the conversation into a sexual vein. The trial judge found, as A.M. said, "no longer did it feel like it was some drunk person messing with them, but that he wanted something".
- [73] When they had left the Burger King to go across the street, the trial judge noted that Mr. Campbell swerved over on his bike slowly and it is clear that he was not in very much control of his bike, N.S. said he was worried, as did the others, that he would be hurt in the traffic when Mr. Campbell would follow them home, or Mr. Campbell would assault them. It was at that time that N.S. testified that Mr. Campbell came and said to N.S., "I'll give you two joints if you have sex with me over there". N.S. took him seriously. N.S. agreed that Mr. Campbell appeared drunk and at one time said that he was Brad Pitt and that there was a lot of rambling conversation.
- [74] The trial judge noted that Mr. Campbell was able to communicate with the officer, he was able to communicate with the boys, he was able to ride his bike in laps around the building. Given that he was not as drunk as the accused in *Bone*, the learned trial judge found that the fact that he had a level of intoxication and no memory of the events was not such that raised reasonable doubt as to the specific intent required.
- [75] It is important to underscore that this is an appeal and not a trial. As noted by Justice Estey writing for the Supreme Court of Canada in *R. v. Harper*, [1982] 1 S.C.R. 2, he stated at 14:

An appellate tribunal has neither the duty nor the right to reassess evidence at trial for the purpose of determining guilt or innocence. The duty of the appellate tribunal does, however, include a review of the record below in order to determine whether the trial court has properly directed itself to all the evidence bearing on the relevant issues.

[76] Mr. Campbell argues that the verdict given the evidence found by the trial judge is unreasonable. In *R. v. Danielisz* (1988), 5 M.V.R. (2d) 244 at 250 (B.C.C.A.), MacDonald J.A. referred to the test enunciated by the Supreme Court of Canada in *R. v. Yebes*, [1987] 2 S.C.R. 168, when describing what should be considered by a summary conviction appeal court under s. 686(1)(a)(i): see *Yebes* at 186:

The Court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the Court must re-examine and to some extent reweigh and consider the effect of the evidence.

[77] The appeal court must "determine what verdict a reasonable jury, properly instructed, could judicially have arrived at, and, in doing so, review, analyze and, within the limits of the appellate disadvantage, weigh the evidence": see *Biniaris* at para. 36. The court must, however, not retry the case nor substitute its view of the evidence: see *M.B.*

[78] Respecting findings of fact absent palpable and overriding error by the trial judge, "his or her perceptions should be respected": see *Gagnon*, at para. 20.

[79] The scope of review by a summary conviction appeal judge is necessarily limited because of the special advantage held by the trial judge weighing matters of credibility. It is not an exercise in reweighing the evidence: *Ceal* at para. 23:

[23] The test for appellate review under s. 686(1)(a)(i), where a verdict is challenged as unreasonable or not supported by the evidence, is whether the verdict is one that a properly instructed jury acting judicially could reasonably have rendered: *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381 at paras. 36-37. The scope of that review is limited because of the "special position of the trier of fact on matters of credibility" and the appellate disadvantage in reweighing the evidence: *Biniaris* at para. 36 and *R. v. W.(R.)*, [1992] 2 S.C.R. 122 at 131.

[80] Given that there was an escalating sexual conversation: see the Reasons for Judgment at para. 23 and consequently, there is no basis for appellate intervention.

[81] I also find that the trial judge did not err by finding that the touching of A.M. was for a sexual purpose as required by s. 151 of the Criminal Code.

[82] In all the circumstances, I find that the trial judge did not err in finding that Mr. Campbell held the requisite specific intent for the offences in ss. 151 and 152 of the Criminal Code. I find that the verdict was in the range of what a reasonable and properly instructed jury could have judicially arrived at.

[83] I find in the trial judge's conclusion, the assault and the invitation to touch were for a sexual purpose and it is supported by the evidence in this case and is not an unreasonable verdict.

[84] In all of the circumstances, I dismiss the appeal.

"Maisonville J."

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Prepared on 25 October 2026 · Esheria