
CANADA / JUDGMENT

R. v. Chen

2003 BCSC 984

COURT

Supreme Court of British Columbia

DECIDED

24 June 2003

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2003BCSC0984

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

HMTQ v. Chen,

2003 BCSC 984

Date: 20030624

Docket: 51856

Registry: Nanaimo

Between:

Her Majesty The Queen

And

Zhong Ming Chen

Before: The Honourable Mr. Justice E.R.A. Edwards

Ruling on Voir Dires

Counsel for the Crown

D. J. Mulligan

I. Wiebe

Counsel for the Accused

E. Williams

Date and Place of trial:

June 16 and 18, 2003

Nanaimo, B.C.

- [1] Voir dires were held to determine the admissibility of evidence of four complainants regarding the psychological impact on them of alleged sexual assaults.
- [2] The Crown's position was that this evidence is admissible on the issue of whether those complainants' consent to Traditional Chinese Medicine ("TCM") treatments administered by the accused was obtained by fraud.
- [3] According to the submissions of counsel, admissibility of the evidence turns on the effect of the decision of the Supreme Court of Canada in *R. v. Cuerrier*, [1998] 2 S.C.R. 371.
- [4] In that case the accused was charged with aggravated assault for engaging in sexual intercourse with the complainant without disclosing he was infected with HIV. The complainant did not contract the disease as a result of the intercourse.
- [5] A key finding of the Court in that case was that "fraud" under s. 265(3)c) of the Criminal Code is no longer limited to fraud as to "the nature and quality of the act" in regard to sexual assault.
- [6] However, the Court held in *Cuerrier* that the Crown must prove that a dishonest act vitiating consent exposed the person consenting to "significant risk of serious bodily harm."
- [7] The narrow point for decision is whether that standard includes psychological as well as physical harm.
- [8] One of the complainants, Ms. B., testified she suffered a small tear or abrasion to her vaginal area as a result of the accused inserting his finger repeatedly into her vagina.
- [9] The Crown did not contend that was evidence of a "significant risk of serious bodily harm". Rather, the Crown contended that Ms. B.'s psychological reaction when she came to believe she had been duped by the accused into consenting to bogus treatment met the test.
- [10] Ms. B. attended the accused for treatment of an anxiety disorder, as an alternative to medication which had been recommended by her physician. She testified that her condition was so exacerbated once she concluded she had been duped that she could not function normally.
- [11] She went to the accused's clinic and demanded her file and her money back. She testified she "lost it" as a result of her compounded anxiety and remained in bed, unable to cope, for weeks. She ultimately began taking medication which overcame her anxiety but she still decided to put the whole episode behind her by moving to another locality.

- [12] Ms. N. testified that she had attended the accused for treatment of fatigue, always feeling cold and poor memory. She testified the accused inserted his finger into her vagina touching her clitoris. She also testified he touched her breasts. These things, she testified, occurred repeatedly during a series of six or seven treatments in January 2002.
- [13] In August 2002, she heard a radio news report that the accused had been charged with sexual assault and was encouraged by friends and her mother to give a statement to the police.
- [14] She testified at the trial that she lost work because of being touched by the accused since she could not concentrate on her job as a counsellor in a group home. She also testified that the experience had interfered with her relationship with her boyfriend by making intimacy difficult, that she no longer trusted TCM, that she now only resorted to female doctors and stated "I don't like Chinese people anymore".
- [15] There is no evidence as to precisely when Ms. N. began to experience these effects nor any evidence that she was ever treated for these consequences of her encounters with the accused.
- [16] Ms. J.S. testified she attended the accused in January and February 2002, for two treatments, complaining of itchy eyes.
- [17] She testified the accused prodded her breasts with his fingers, squeezed her nipples, inserted his fingers into her vagina and stimulated her clitoris to the point "it felt very sexual."
- [18] Ms. J.S. testified that these events "totally changed" her life, that they made her doubt herself, withdraw from friends and family and become "paranoid and anxious" at night. She attended counselling at Haven House two or three times and spoke to her doctor as a result of her encounters with the accused.
- [19] Ms. A.S. testified that the accused touched her breasts with his hands and mouth and inserted his fingers into her vagina for what she understood were treatment purposes. She was also a student at the "Global College of Legalized Chinese Medicine and Culture" run by the accused.
- [20] When she concluded the "treatments" she described were not for her benefit she quit both the treatments and her studies at the College.
- [21] She testified the events changed every aspect of her life, including her career aspirations in the field of TCM, that she felt betrayed and that she sought professional counselling as a result.
- [22] In *Cuerrier*, the Supreme Court of Canada at paragraph 123 found, apparently on the basis of judicial notice, that the non-disclosure of HIV infection by a sexual partner can have "deadly consequences" on a "victim" who has unknowingly consented to intercourse.

- [23] Although it is not stated, the Supreme Court of Canada's analysis seems to have proceeded on the assumption that the accused must be aware of the potentially deadly consequence for a sexual partner of engaging in sexual intercourse with the accused.
- [24] To make this case analogous to *Cuerrier*, the court would have to conclude that it was sufficiently notorious that touching of the kind described by the complainants could create the "significant risk" of serious psychological consequences equivalent to "serious bodily harm" and that the accused would know that.
- [25] The court would not have to conclude that the accused knew this would be the consequence of what he did to particular individuals, but that he knew it was a risk that could befall anyone whom he touched as the complainants allege he touched them.
- [26] In short, for the Crown to draw a parallel between this case and *Cuerrier* it would be necessary to prove the accused must have known his conduct could present a "significant risk" to anyone he touched in the way the complainants described, just as the Supreme Court of Canada in *Cuerrier* proceeded on the basis that the accused in that case must have known, not that the complainant would be infected with HIV from intercourse, but that there was a significant risk of serious bodily harm from infection following intercourse with him.
- [27] In the present case the Crown did not contend that the court could take judicial notice of the fact that encounters with the accused of the type described by the complainants could result in risk of serious psychological consequences for his female patients.
- [28] Instead it sought to introduce evidence that some of his patients, the complainants whose evidence I have outlined, experienced such consequences.
- [29] Defence counsel objected to the admissibility of that evidence essentially on the basis that the *Cuerrier* criterion of "serious bodily harm" did not extend to psychological harm.
- [30] To this, Crown counsel responded on two bases. First, that since this is a sexual assault case not an aggravated assault case like *Cuerrier*, the requirement should be "read down" to include significant risk of psychological as well as physical harm in the category of "bodily harm." As I understand the Crown submission it is that "bodily" harm should be read to mean "personal" harm whether physical or psychological.
- [31] In support of this submission, Crown counsel referred to the Supreme Court of Canada decision in *R. v. McCraw* (1991), 66 C.C.C. (3d) 517 which held that "serious bodily harm" in section 264.1(1)(a) of the Criminal Code includes "any hurt or injury, whether physical or psychological, that interferes in a substantial way with the physical or psychological integrity, health or well-being of the complainant" and the decision of the Alberta Court of Appeal in *R. v. Mathieu* (1996), 111 C.C.C. (3d) 291 which adopted that definition and indicated that a finding of psychological harm could be made on the basis of evidence of a complainant herself without expert evidence.

- [32] Both these cases antedate Cuerrier, which at paragraphs 134 and 135 indicates that fraud leading to consent to sexual intercourse which results in "detriment in the form of mental distress" to a complainant "should not provide the foundation for a conviction for sexual assault."
- [33] Paragraph 135 indicates that the old requirement that the fraud necessary to vitiate consent in a sexual assault case must be fraud as to the nature and quality of the act was "too restrictive" but that "some limitations on the concept of fraud as it applies to s. 263(3)(c) are clearly necessary" to close the flood gates to "trivialization" of sexual assault charges.
- [34] The restriction which the Supreme Court of Canada concluded "provides a reasonable balance" to ensure that fraud other than fraud as to the nature and quality of the sexual act could vitiate consent in light of s. 263(3)(3) was the need to prove "risk of serious harm."
- [35] In choosing as an example of trivialization "detriment in the form of mental distress" the Supreme Court of Canada in Cuerrier did not refer to its conclusion in McCraw that "serious bodily harm" includes substantial interference with psychological integrity.
- [36] To reconcile Cuerrier with McCraw I must conclude that a substantial interference with a complainant's psychological integrity more serious than "mental distress" could constitute a "risk of serious harm" under the Cuerrier test.
- [37] At this stage, I need only rule on the admissibility of evidence intended to show that the four complainants suffered emotional and psychological consequences from their encounters with the accused, not weigh that evidence.
- [38] On the authority of Mathieu, this evidence is potentially probative on an issue in dispute in this case. I conclude that the evidence of the four complainants as to their emotional or psychological reaction to their encounters with the accused (which I only briefly summarized above) is admissible.

"E.R.A. Edwards, J."

The Honourable Mr. Justice E.R.A. Edwards

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