

CANADA / JUDGMENT

R. v. Harry

2022 BCSC 2407

COURT

Supreme Court of British Columbia

DECIDED

2 August 2022

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2022 BCSC 2407 R. v. Harry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Harry,

2022 BCSC 2407

Date: 20220802

Docket: 16876

Registry: Powell River

Regina

v.

Lance Jordan Harry

Restriction on Publication: A publication ban has been mandatorily imposed under s. 486.4 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify the complainant. This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Madam Justice Wilkinson

Oral Reasons for Judgment

Counsel for the Crown:

O. Kuzma, Q.C.

Counsel for the Accused:

N. Acker

Place and Date of Trial:

Powell River, B.C.

June 27-30, 2022

and July 5-6, 2022

Place and Date of Judgment:

Powell River, B.C.

August 2, 2022

- [1] Mr. Harry is charged with sexual and driving offences arising from activity taking place June 4, 2020 near Powell River.
- [2] He is charged with one count of touching for a sexual purpose the complainant, a person under the age of 16 years, contrary to s. 151 of the Criminal Code, R.S.C. 1985, c. C-46.
- [3] He is further charged with one count of inviting, counselling, or inciting the complainant, a person under the age of 16 years, to touch Mr. Harry. Contrary to s. 152 of the Code.
- [4] Mr. Harry is also charged with sexually assaulting the complainant, contrary to s. 271 of the Code.
- [5] Additionally, Mr. Harry is charged with one count of dangerously operating a vehicle contrary to s. 320.13(1) of the Code, and one count of failing to stop while being pursued by police contrary to s. 320.17 of the Code.
- [6] These are my reasons for judgment after trial of the charges. As these are oral reasons, I may minimally edit them if a transcript is ordered, including providing further anonymity to the complainant, however the end result will not change.

Undisputed Facts

- [7] As the evidence was presented at trial there were a number of undisputed facts from witness testimony and admissions. Based on this evidence, credibility is not central to my findings. Where there is any difference in the evidence I accept the evidence of Mr. Harry, who was not cross-examined by the Crown. This is one of those cases where it is tantamount to an acceptance of the accused's version: *R. v. Christensen*, 2001 BCSC 1196 at para. 17, citing *R. v. Dyck*, [1970] 2 C.C.C. 283 (B.C.C.A.).
- [8] On the date of the alleged incidents, the complainant was 13 years old and Mr. Harry was 36 years old.
- [9] Mr. Harry had been consuming alcohol throughout the day since 7:00 a.m. on June 4, 2020. He testified that he and a woman named Sarah also consumed cocaine with the complainant's mother at her home that morning. After the cocaine was consumed, the complainant joined her mother, Mr. Harry and Sarah in the living room. She drank three of

four alcoholic drinks, which Mr. Harry testified were poured by her mother. The complainant and her mother testified that the complainant did not drink in her mother's presence. Marihuana was smoked as well. Mr. Harry testified he thought everyone smoked it, including the complainant. The complainant and her cousin denied taking a toke, however the complainant testified she did smoke from Mr. Harry's marihuana pipe, while in the car with him. At the time, Mr. Harry was a drug and alcohol addict.

- [10] In the late afternoon, Mr. Harry took the complainant, Sarah and the complainant's cousin for a drive, ending up on the logging roads north of town to a local lake. The complainant's cousin is two years older than the complainant. While driving, and at the lake, The complainant and Sarah drank more alcohol and either the complainant and/or Sarah offered alcohol to the complainant and her cousin, of which they both consumed a large quantity.
- [11] In the evening they returned from the lake, Mr. Harry driving, and ended up at Mr. Harry's residence. Mr. Harry and the complainant continued to drink.
- [12] Mr. Harry and the complainant then went back to the logging roads and lake area, Mr. Harry driving what appears to have been a different vehicle.
- [13] While parked at the lake, Mr. Harry engaged in sexual activity with the complainant. Mr. Harry placed his hand on the complainant's inner thigh and her crotch and asked if that was all right and the complainant then kissed Mr. Harry's neck. Either before or after the previous activity, the complainant performed oral sex on Mr. Harry. Mr. Harry testified he did not take his pants off but instead he just hung his penis out when oral sex was performed on him.
- [14] Mr. Harry then vaginally penetrated the complainant in the front passenger seat of the car.
- [15] The complainant testified she told Mr. Harry to stop, about 15 minutes into the 30 minutes of sexual activity. She testified that she was sure she said it quietly and she thought he did not hear her. Mr. Harry testified he did not at any point hear the complainant say to stop.
- [16] Alerted by an ATV driver complaining of dangerous driving, two R.C.M.P. vehicles went to the logging roads by the lake at approximately 9:15 p.m. They set up patrols and when Mr. Harry's vehicle came driving up from a short lake spur road, Cpl. Gaiger turned his vehicle lights on. He identified the driver as Mr. Harry, who was clearly in view, as well as a young female passenger he did not know. Cpl. Gaiger radioed Cst. Peers to inform him of the sighting. Mr. Harry then reversed the car as Cpl. Gaiger exited his vehicle and shouted "Stop police stop police".
- [17] Mr. Harry, in reverse, hit a tree smashing his rear window. Cpl. Gaiger went to his vehicle and turned on his rooftop police light strobes.
- [18] Mr. Harry turned his vehicle around and headed back down the lake spur road.

- [19] Cpl. Gaiger radioed Cst. Peers and then followed Mr. Harry down the lake road. He then saw Mr. Harry turn left and drive his car along a small foot path, crashing through the brush. In his larger vehicle, Cpl. Gaiger followed Mr. Harry through the now ploughed path back around to the lake spur road.
- [20] Mr. Harry drove back up the lake road. Meanwhile Cst. Peers had driven his vehicle down the lake spur road and came across Mr. Harry. Seeing Mr. Harry's vehicle coming towards him at approximately 40 to 50 km/h, he stopped his vehicle approximately 13 to 20 yards away and turned on his police strobes. Mr. Harry's vehicle stopped, then drove forward trying to get around the right side of Cst. Peers' vehicle and collided with the police vehicle. The damage was not extensive, however, the alignment rendered the vehicle unsafe. At that time, Cst. Peers also recognized Mr. Harry.
- [21] Cst. Peers exited his vehicle and drew his firearm, telling Mr. Harry to stop and raise his hands. Mr. Harry exited his vehicle, looked at Cst. Peers, then ran in the opposite direction. By that time, Cpl. Gaiger had appeared. Mr. Harry ran by his vehicle and the Cpl. tackled him to the ground and placed him under arrest. Cpl. Gaiger took Mr. Harry to the detachment. Mr. Harry testified that he fled from police pursuit because that is what he always does when confronted by the police.
- [22] Cst. Peers went to the passenger side of Mr. Harry's vehicle and collected the complainant, placing her in his vehicle. He then waited for a tow truck for Mr. Harry's vehicle, and then later for another police vehicle to collect himself and the complainant since his vehicle was not drivable.
- [23] Upon returning the complainant to her home, the complainant's mother came out of her home to tell Cst. Peers that her daughter disclosed a sexual assault. The complainant then attended at the local hospital and underwent a forensic sexual assault exam. Mr. Harry's DNA and no other DNA other than the complainant's was matched in an anal swab and partially matched on a vaginal swab.
- [24] As I noted above, Mr. Harry acknowledges the sexual activity. The next day Mr. Harry sent a Facebook message to the complainant saying "U ok sorry about yesterday".

Sexual Interference and Touching

- [25] Mr. Harry raises the defence under s. 150.1(4) of the Code of mistake of age to the charges under ss. 151 and 152 of the Code. His testimony was that he thought the complainant was "of age because she was drinking and partying with her mom". He further testified that he thought the complainant's cousin was 18 or 19 because he was drinking, and that he doesn't think about age when drinking and partying. The Crown did not cross-examine Mr. Harry.
- [26] This defence is described in *R. v. Chapman*, 2016 ONCA 310, citing the trial judge's reasons with approval at para. 28:

The Code demands that those who engage in sexual activity with young persons will make reasonable efforts to ascertain the age of prospective partners. Section 150.1(4) of the Criminal Code limits the application of the defence of honest but mistaken belief to cases in which the accused has taken all reasonable steps to ascertain the age of the complainant. This section places an evidential but not persuasive burden on the accused. It requires only that there be evidence, which, if true, would result in an acquittal. The evidence need only raise a reasonable doubt, but must be directed to "all" the reasonable steps that should have been taken. The jurisprudence provides that the requirement set out in s. 150.1(4) is an earnest inquiry or some other compelling factor which negates the need for an inquiry. Whether an accused took all reasonable steps is fact-specific and depends on the circumstances.

- [27] The Supreme Court of Canada has provides further guidance in *R. v. George*, 2017 SCC 38 at paras. 8-9:
- [8] At common law, "true crimes" - like those at issue here - would have a purely subjective fault element. However, through statutory intervention, Parliament has imported an objective element into the fault analysis to enhance protections for youth (*Stewart*, at pp. 4-23 and 4-24). As a result, to convict an accused person who demonstrates an "air of reality" to the mistake of age defence, the Crown must prove, beyond a reasonable doubt, either that the accused person (1) did not honestly believe the complainant was at least 16 (the subjective element); or (2) did not take "all reasonable steps" to ascertain the complainant's age (the objective element) (*Stewart*, at p. 4-24; *M. Manning, Q.C.*, and *P. Sankoff, Manning, Mewett & Sankoff: Criminal Law* (5th ed. 2015), at p. 1113 ("Manning, Mewett & Sankoff")).
- [9] Determining what raises a reasonable doubt in respect of the objective element is a highly contextual, fact-specific exercise (*R. v. Duran*, 2013 ONCA 343, 3 C.R. (7th) 274, at para. 52; *R. v. P. (L.T.)* (1997), 113 C.C.C. (3d) 42 (B.C.C.A.), at para. 20; *R. v. K. (R.A.)* (1996), 106 C.C.C. (3d) 93 (N.B.C.A.), at p. 96; *Stewart*, at p. 4-25; *A. Maleszyk, Crimes Against Children: Prosecution and Defence* (loose-leaf), vol. 1, at p. 11-4). In some cases, it may be reasonable to ask a partner's age. It would be an error, however, to insist that a reasonable person would ask a partner's age in every case (see e.g. *R. v. Tannas*, 2015 SKCA 61, 21 C.R. (7th) 166, at para. 27; *R. v. Gashikanyi*, 2015 ABCA 1, 588 A.R. 386, at para. 17). Conversely, it would be an error to assert that a reasonable person would do no more than ask a partner's age in every case, given the commonly recognized motivation for young people to misrepresent their age (*R. v. Dragos*, 2012 ONCA 538, 111 O.R. (3d) 481, at paras. 17, 26, 45 and 51; *L. Vandervort, "Too Young to Sell Me Sex?!" Mens Rea, Mistake of Fact, Reckless Exploitation, and the Underage Sex Worker* (2012), 58 *Crim. L.Q.* 355, at pp. 360 and 375; *J. Benedet, Comment on R. v. Tannas* (2015), 21 C.R. (7th) 166, at p. 168; *Stewart*, at p. 4-26.1). Such narrow approaches would contradict the open-ended language of the reasonable steps provision. That said, at least one general rule may be recognized: the more reasonable an accused's perception of the complainant's age, the fewer steps reasonably required of them. This follows inevitably from the phrasing of the provision ("all reasonable steps") and reflects the jurisprudence (*R. v. Osborne* (1992), 17 C.R. (4th) 350 (Nfld. C.A.), at para. 64), and academic commentary

(Manning, Mewett & Sankoff, at p. 1113).

[Emphasis added.]

[28] As described in *R. v. Morrison*, 2019 SCC 15 at para. 119, the "air of reality" threshold for the defence of mistake of age will only be met if:

[119] ... the trier of fact could find, on the evidence, that the accused took steps capable of amounting to "reasonable steps" in the circumstances to ascertain the other person's age and that the accused honestly believed the other person was of legal age.

[29] In this case, Mr. Harry bases his honest but mistaken belief that the complainant's age was at least 16 on his observation that she was drinking and partying in front of her mother. He then testified that he does not think about age when he is drinking and partying.

[30] Mr. Harry testified that the complainant's mother provided him with cocaine and she partook in its consumption, in her living room. From his testimony I take it he had faith in the complainant's mother to ensure that the complainant was of age (what age is unclear) to drink alcohol, despite her use of cocaine in her own living room in the house where the complainant was also present.

[31] On viewing the video statement made by the complainant two weeks after the incident, she looked to the causal observer as someone younger than 16. She is now 15 and continues to present as younger than or perhaps close to that age. Nothing in her demeanour would suggest she was at least 16 years old at the time of the assault.

[32] His defence of mistaken belief in age does not have an air of reality.

[33] However, if I am in error, and there is an air of reality to Mr. Harry's defence, then the Crown must negate the defence by proving beyond a reasonable doubt that either Mr. Harry did not honestly believe the complainant was at least 16, or did not take all reasonable steps to determine her age.

[34] Mr. Harry observed the complainant drinking alcohol and smoking some marihuana over a period of many hours before he engaged in sexual activity with her. He testified that he had a very high tolerance for alcohol and drugs at the time. He never asked her or anyone else about the complainant's age, nor could he recall any specifics of their conversations throughout the day, saying he remained quiet for much of the time. After the complainant had consumed so much alcohol, asking her age alone would have been insufficient, as Mr. Harry himself testified she was buzzing.

[35] The circumstances in her mother's home, and the complainant's young presentation were red flags which should have alerted Mr. Harry to take some steps to ascertain the complainant's age before engaging in sexual activity with her.

- [36] Mr. Harry himself testified that he doesn't think about age when he is drinking and partying. This is a case of Mr. Harry exhibiting a reckless indifference to the complainant's age. I find beyond a reasonable doubt that Mr. Harry failed to take any reasonable steps to ascertain the complainant's age. The defence of mistake of age does not apply.
- [37] I find that the Crown has proven beyond a reasonable doubt that Mr. Harry touched for a sexual purpose the complainant, a person under the age of 16 years, contrary to s. 151 of the Criminal Code, by touching her inner thigh and crotch and vaginally penetrating the complainant on June 4, 2020, near Powell River.
- [38] I further find that the Crown has proven beyond a reasonable doubt that Mr. Harry invited, counselled, or incited the complainant, a person under the age of 16 years, to touch Mr. Harry contrary to s. 152 of the Code by taking his penis out of his pants and offering it to the complainant for the purpose of engaging in an act of fellatio with him on June 4, 2020 near Powell River.

Sexual Assault

- [39] The actus reus of sexual assault is comprised of three elements: (i) touching, (ii) of a sexual nature, (iii) and the absence of consent: *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at para. 25. The first two elements are determined objectively, but the absence of consent is subjective, and "determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred": *Ewanchuk* at para. 26. The mens rea of the offence requires the Crown to prove that the accused intended to touch the complainant: *Ewanchuk* at para. 41.
- [40] There is no question that the first two elements are met. Mr. Harry testified that he intentionally touched the complainant in a sexual nature.
- [41] For the third element, Mr. Harry raises the defence of mistake in age such that the accused believed she was of age to consent.
- [42] This defence is not available to Mr. Harry, pursuant to s. 150.1 of the Criminal Code:
- 150.1 (1) Subject to subsections (2) to (2.2), when an accused is charged with an offence under section 151 or 152 or subsection 153(1), 160(3) or 173(2) or is charged with an offence under section 271, 272 or 273 in respect of a complainant under the age of 16 years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge.
- [43] As I have found above, Mr. Harry is guilty of touching a person under the age of 16 years, the complainant, for a sexual purpose, contrary to s. 151 of the Criminal Code. At the time of the assault, the complainant was 13 years old; Mr. Harry was 36 years old. The defence of mistake in age is not applicable here: whether the defence of consent is available is based on a finding of fact with regard to the ages of the accused and complainant.

[44] As well, as I have found above, the Crown has proven beyond a reasonable doubt that the defence of mistake in age, where it could be applied, is not available to Mr. Harry.

[45] Accordingly, Mr. Harry does not fall under any exception to s. 150.1(1).

[46] As a result, I find that the Crown has proven beyond a reasonable doubt that Mr. Harry sexually assaulted the complainant and is guilty on Count 3.

Dangerous Driving

[47] On the charge under Count 4, dangerous driving, Mr. Harry backed his vehicle, with a passenger, in the dark, into a tree smashing out the rear window, then continued to drive through a narrow footpath and bush. He then drove the vehicle into a police vehicle trying to get around it. The manner in which he operated the vehicle placed himself, his passenger the complainant and Cst. Peers at risk and is a marked departure from the standard of care that a reasonable person would observe in Mr. Harry's circumstances.

[48] This is conduct which rises to the level of dangerous driving contemplated under s. 320.13 of the Code.

Flight from Pursuit

[49] On the charge under Count 5, flight from pursuit, Mr. Harry acknowledges he committed this crime and that the Crown has proven the requisite elements. On the evidence before me it is clear that the Crown has proven beyond a reasonable doubt that Mr. Harry failed to stop while being pursued by police on June 4, 2020 near Powell River contrary to s. 320.17 of the Code.

Conclusion

[50] Mr. Harry, please stand.

[51] For the reasons I have stated, I find you guilty of the charge under Count 1 of touching for a sexual purpose, contrary to s. 151 of the Code; under Count 2 of inviting, counselling, or inciting to touch contrary to s. 152 of the Code; under Count 3 for sexual assault contrary to s. 271 of the Code; under Count 4 for dangerously operating a vehicle contrary to s. 320.13(1) of the Code; and under Count 5 for failing to stop while being pursued by police contrary to s. 320.17 of the Code.

[52] By reason of the same acts involved in Counts 1 and 2 with Count 3, I enter a stay of Count 3, sexual assault, by reason of the principle set out in *R. v. Kienapple*, [1975] 1 S.C.R. 729.

"Wilkinson J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/22/24/2022BCSC2407.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-harry-2022>

Prepared on 29 October 2026 · Esheria