

CANADA / JUDGMENT

R. v. R.A.

2024 BCCA 283

COURT

British Columbia Court of Appeal

DECIDED

7 August 2024

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

2024 BCCA 283 R. v. R.A.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. R.A.,

2024 BCCA 283

Date: 20240807

Docket: CA48917

Between:

Rex

Appellant

And

R.A.

Respondent

Restriction on publication: A publication ban has been imposed under

s. 486.4 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness.

This publication ban applies indefinitely unless otherwise ordered.

Before:

The Honourable Mr. Justice Willcock

The Honourable Madam Justice Griffin

The Honourable Mr. Justice Voith

On appeal from: An order of the Provincial Court of British Columbia, dated
February 10, 2023 (R. v. R.A., Surrey Docket 247411).

Counsel for the Appellant:

M. Shah

I. Grant (via videoconference)

Counsel for the Respondent:

M.P. Klein, K.C.

Place and Date of Hearing:

Vancouver, British Columbia

May 30, 2024

Place and Date of Judgment:

Vancouver, British Columbia

August 7, 2024

Written Reasons by:

The Honourable Mr. Justice Willcock

Concurred in by:

The Honourable Madam Justice Griffin

The Honourable Mr. Justice Voith

Summary:

This is an appeal from acquittal on a charge of indecent assault. The facts are not in dispute. In 1978, the respondent was babysitting the then five-year-old complainant at his home. As he was masturbating in the bathroom he saw the complainant standing at the door. He asked her to touch him and she did so. The respondent was acquitted on the basis there had been no "assault" under the Criminal Code. The Crown submits the trial judge erred by misinterpreting the elements of assault and holding that the sexual touching had to be physically initiated by the accused.

Held: Appeal allowed. Any intentional contact on the part of an adult with a child committed in circumstances of a sexual nature meets the definition of assault, regardless of whose movement initiated the contact. Applying that approach, the admitted evidence demonstrates there was a direct and intentional application of force to the person of the complainant constituting an assault under s. 244(a) of the Criminal Code, as it existed in August 1978. The acquittal is set aside, a conviction is entered in its place and the respondent is remitted for sentencing.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Background

[1] This is a Crown appeal from acquittal. The facts are not in dispute.

[2] In August 1978, the respondent was babysitting the complainant and other children at his home. In a statement made to the police, he explained that he was masturbating in the bathroom when he saw the then five-year-old complainant standing at the door. She asked what he was doing. He said "I'm making ice cream". He then asked the complainant if she wanted to lick the ice cream. This is his description of the incident:

as soon as it touched her I pulled away, looked at her face and she [had] some stuff on her. I wiped it off and I said to, "kay you, you have to leave now and um, you can't tell anybody 'cause will get in trouble". And she left, and I threw up in the toilet. Um, I can't remember what I thought. It was something to the effect, "what the hell did you do?"

[3] When asked by the interviewing police officer what happened after that, he explained: "Then she put her mouth on it and backed away. And when I saw that on her face, I got quite upset and uh, you heard the rest I wiped it off her".

[4] The respondent was charged with one count of indecently assaulting the complainant contrary to s. 149 of the Criminal Code, R.S.C. 1970, c. C-34. As that section existed in 1978, it provided:

149. (1) Every one who indecently assaults a female person is guilty of an indictable offence and is liable to imprisonment for five years.

[5] Following a trial in the Provincial Court, the respondent was acquitted of the charge on February 10, 2023.

[6] The trial judge, after setting out the elements of the offence of indecent assault, determined that proof of only one of those elements was in question: the "only issue" in the case was whether there had been an "assault". She noted that the definition of assault in the Criminal Code has not changed substantially since 1978. At that time, s. 244 read:

244. A person commits an assault when

(a) without the consent of another person or with consent, where it is obtained by fraud, he applies force intentionally to the person of the other, directly or indirectly;

- (b) he attempts or threatens, by an act or gesture, to apply force to the person of the other, if he has or causes the other to believe upon reasonable grounds that he has present ability to effect his purpose;
- [7] After carefully reviewing the cases cited to her dealing with the elements of the offence of assault, including *Fairclough v. Whipp*, [1951] 2 All E.R. 834 (K.B.) [Fairclough]; *R. v. Rolfe* (1952), 36 Cr. App. R. 4 (C.C.A.) [Rolfe]; *R. v. Beamish* (1965), 45 C.R. 264, 1965 CanLII 709 (N.S.S.C.); *R. v. Baney* (1971), 6 C.C.C. (2d) 75, 1971 CanLII 513 (C.A.) [Baney]; *R. v. Bartlett* (1989), 79 Nfld. & P.E.I.R. 143, 1989 CanLII 4889 (S.C.); *R. v. Cadden* (1989), 48 C.C.C. (3d) 122, 1989 CanLII 2847 (B.C.C.A.) [Cadden]; *R. v. Voudrack*, [1992] N.W.T.R. 264, 1992 CanLII 14323 (S.C.); *R. v. R.T.*, 2006 CanLII 4938, [2006] N.J. No. 51 (Nfld. P.C.) [R.T.]; and *R. v. R.V.*, 2021 SCC 10 [R.V.], the trial judge found there had been no direct, intentional application of force to the complainant and no attempt or threat by an act or gesture to apply force to the complainant. Consequently, the trial judge concluded the Crown had not proven beyond a reasonable doubt that an assault had occurred.
- [8] The issue before this Court is whether the trial judge erred in determining that the incident, the facts of which are uncontroverted, did not constitute an "assault" under s. 244 of the Criminal Code, as that provision existed in August 1978.

Discussion

There was a direct and intentional application of force

- [9] In my opinion, with respect, the trial judge erred in concluding there was no direct application of force by the respondent to the complainant and in treating this case as if the complainant had not been touched. I say that for two reasons: first, by any definition of assault, even the narrow conception adopted in English cases following *Fairclough* (a judgment discussed in further detail below), the respondent touched the complainant in a manner constituting an assault. Second, I would expressly reject that narrow conception and adopt the view that any intentional contact with a child by an adult that is committed in circumstances of a sexual nature constitutes a direct and intentional application of force by the adult to the child's person, and thus meets the definition of assault contained in s. 244(a) of the Criminal Code, regardless of whose physical movement initiated the contact.

The accused touched the complainant

- [10] In the present case, the trial judge held:
- [53] [I]n my view, it is clear that I must find an assault took place before I can find [the respondent] guilty of indecent assault. The definition of assault is set out in the case of *R.V.*, as well as the Criminal Code. There must be intentional force applied by [the respondent] to the complainant, or there must be attempts or threats by act or gesture to apply force to the complainant. The touching does not need to be a violent force, but the touching must be done by the accused in order to obtain a conviction for assault.

- [54] The cases where the accused has been convicted despite not touching the complainant, Rolfe and Cadden, involve actions of the accused that amounted to threats, and in both cases the incidents occurred in confined spaces, together with indecent suggestions and directions, and those were considered threats.
- [55] In this case, the complainant came into the washroom that was occupied by [the respondent]. There was no evidence the door was shut behind her. [The respondent] suggested that he was making ice cream and invited her to lick it, which she did. He did not touch her at all, except for the contact between them when she licked it. He did he did not make any threats.
- [56] In my view, the assault has not been proven beyond reasonable doubt and therefore I must acquit [the respondent] of the charge of indecent assault.
- [Emphasis added.]
- [11] This is not a case where there was no touching of the complainant. The respondent deposited semen on the complainant's face and he put his penis in the complainant's mouth. I do not accept that what occurred here would not be an assault under English cases. The English courts recognize that the deposit of ejaculate on a complainant, and any penetration of a complainant, amounts to an assault and distinguish such cases from *Fairclough: R. v. Brooks*, [2021] EWCA Crim 1468 at para. 9; *R. v. J.*, [2004] UKHL 42, [2005] 1 A.C. 562 at para. 84; *R. v. McCormack*, [1969] 2 QB 442; and *R. v. Price*, [2024] EWCA Crim 463.
- [12] In *Price*, Lord Justice Singh, in upholding a conviction for indecent assault and, more specifically, in rejecting a submission that the trial judge was wrong in law to rule that the [accused] had assaulted the complainant, wrote:
56. The decision and reasoning in *Fairclough* have been subjected to academic criticism: see C Sjolín, 'The need to kill off zombie law: indecent assault, where it went wrong and how to put it right' (2017) 81 J Crim L 50. But this is not the time or place to consider whether it should be overruled. It was recently approved by this Court in *Dunn*. It was not submitted to us that that line of authority was wrongly decided. Nevertheless, we have reached the conclusion that that line of authority is distinguishable from the present case.
57. This is because that line of authority was concerned with touching of the defendant by the complainant and not with penetration by the defendant of any orifice of the complainant. In contrast, the present case concerns the penetration by the appellant of an orifice, namely the complainant's mouth.
- [13] Any doubt with respect to whether what occurred in this case would constitute an assault under English law should be resolved by the following passage (at para. 59) in *Price*, responding to the suggestion of defence counsel that there had been no penetration of an orifice:

We agree with the Judge that the suggestion that all that happened in this case was the "envelopment" by the complainant of the appellant's penis rather than penetration of her mouth by the defendant's penis, was "dancing on the head of a pin"...

- [14] There is Canadian authority to similar effect. In *R. v. Z.(A.)* (2000), 137 O.A.C. 385, 2000 CanLII 16976 (Ont. C.A.) [Z.(A.)], the Ontario Court of Appeal had no difficulty finding that an accused had assaulted the child complainant. The court held:
- [6] The "force" required for an assault may be no more than a touching of the person of the complainant in circumstances which interfere with the bodily integrity of the complainant. In the context of the definition of assault, "force" does not necessarily connote some minimum level of violence or any animus towards the complainant by the perpetrator: *R. v. Burden* (1981), 64 C.C.C. (2d) 68 (B.C.C.A.); *R. v. Cadden* (1989), 48 C.C.C. (3d) 122 (B.C.C.A.). A friendly but unwanted kiss may be an assault.
- [8] The Crown's evidence established that the respondent took the seven year old complainant to a secluded area and induced her to perform fellatio. That act involved a touching of the complainant by the respondent and an interference with her bodily integrity. Given the complainant's age, consent was irrelevant. There was, therefore, evidence that the respondent applied "force" to the complainant and thereby assaulted her. The trial judge erred in law in granting a directed verdict on the sexual assault charge.

[Emphasis added.]

- [15] The respondent argues that Z.(A.) does not assist the Crown because "It is difficult to discern who touched whom from the facts, but in the end, there is a finding that there was an application of force". In my view, the case strongly supports the proposition that an adult who touches the child in a manner which interferes with the child's bodily integrity thereby "applies force" to the child within the meaning of the assault provision of the Criminal Code.
- [16] Having regard to this jurisprudence, I am of the view that the trial judge should have found the accused touched the complainant in circumstances of a sexual nature and that touching constituted a direct and intentional application of force.

It does not matter who touched whom

- [17] That said, it is my opinion that we should allow the Crown appeal not simply because the facts fall within the narrow English definition of assault as described in *McCormack and Price*, but because the line of authority from *Fairclough* through *R. v. Dunn*, [2015] EWCA Crim 724, a relatively recent decision of the England and Wales Court of Appeal following and applying *Fairclough*, was wrongly decided insofar as it draws a distinction in the analysis of assault of children between persons touched and persons doing the touching.

- [18] The Crown submits that any intentional contact with a child by an adult accused in circumstances that are sexual in nature meets the definition of assault contained in s. 244(a), now s. 265(1)(a), of the Criminal Code, regardless of who initiated the contact. I agree. Whether intentional contact with a child amounts to an assault should not depend upon the specific nature of the sexual touching. The question should be whether the adult accused intentionally precipitated non-consensual physical contact with the child.
- [19] The judge correctly observed that an assault does not require the application of physical force beyond contact without consent. In this case there was physical contact, it was indecent, and it was non-consensual. It seems to me absurd to ask whose physical movement initiated the contact--who touched whom--in these circumstances. In my opinion, the fine distinction drawn in the cases relied upon by the respondent, and accepted by the trial judge as valid, differentiating between, on the one hand, physical contact that can be described as an accused touching a complainant and, on the other, contact described as a complainant touching an accused, is an irrational and pernicious distinction in cases involving children.
- [20] On the facts of this case, the respondent and the complainant touched each other. The respondent was not passive in this encounter. He invited the contact that occurred. He facilitated it. As an adult, he directed a five-year-old child under his care to touch him in a sexual manner. He was an active agent, the precipitator of the event. The respondent himself said "as soon as it touched her I pulled away". Implicit in those comments, when read in their context, is recognition by the respondent of his active role in the touching. In my opinion, conviction or acquittal cannot depend upon which body was in motion at the moment contact was initiated or during the period of physical contact said to constitute the assault.
- [21] Fairclough is a brief judgment on an appeal from the dismissal of an indecent assault charge that appears to stand for two propositions: first, that a person who is touched is not applying force to the person doing the touching; and, second, that an invitation to touch does not amount to an attempt or threat to apply force. The accused invited a nine-year-old to touch him. Lord Goddard C.J. started from the position that the accused had not touched the child. He then focused his analysis upon the second question: whether there had been an assault by threatening. He held, at 834:

An assault can be constituted, without there being a battery, for instance, by a threatening gesture or a threat to use violence against a person, but I do not know any authority which says that where one person invites another person to touch him that can be said to be an assault. I cannot hold that an invitation to somebody to touch the invitor can amount to an assault on the invitee.

- [22] Fairclough has once been considered by this Court, in Cadden, an appeal from a sexual assault conviction. The evidence in that case was that the accused, a school teacher, would have his students, children, get under his desk while he was seated and touch him in a sexual manner. Relying on Fairclough and the cases following it, the accused contended that there had been no assault committed. On his behalf it was argued that he had not applied any physical force to the students or ever attempted or threatened to do so.
- [23] Justice Hinkson, writing for the Court, canvassed Lord Goddard's decisions, including Fairclough, *Director of Public Prosecutions v. Rogers*, [1953] 2 All E.R. 644 (Q.B.) [Rogers], and Rolfe. He described Fairclough as a case where the accused had invited sexual touching, and Rolfe as a case where the accused had made an indecent suggestion, constituting a threat. In the result, he likened the case before him to Rolfe, finding that the acts and gestures of the accused constituted not simply an "invitation", but rather a threat to invade the bodily integrity of the child victims. Coupled with the accused's present ability to effect that purpose, such threats constituted an assault within the meaning of the Criminal Code.
- [24] The fact that the accused in Cadden was convicted of sexual assault on the basis that he had threatened to apply force to the students, notwithstanding the fact that there was evidence that the students had in fact followed his instructions and touched him, could suggest that the Court was not prepared to find he had applied force intentionally to the person of the students when they engaged in the sexual acts, but the question was not directly addressed.
- [25] Justice Hinkson suggested that Fairclough had been previously applied in Canada in *R. v. McCallum* (1969), [1970] 2 C.C.C. 366, 1969 CanLII 1036 (P.E.I.S.C.) [McCallum], and in Baney. In only one of those cases, however, was there any direct physical contact between the accused and the complainant.
- [26] In McCallum, the appellant had entered a room naked and invited a girl, of unstated age, to touch him. She did so. Trainor J., for the majority allowing the appeal and quashing the conviction, wrote at 371:

Nowhere in the evidence in there any suggestion that the appellant in any way either intentionally or unintentionally applied force to the complainant or that he attempted or threatened, by any act or gesture, to apply force to her. What is alleged in the evidence is that he appeared nude before her and invited her to handle his private parts in a manner that she indicated by gestures. This conduct, reprehensible as it was if proved by corroboration, did not, in the light of the definition of assault and the dictum of Lord Goddard [in Fairclough], above, amount to an assault.

[Emphasis added.]

- [27] The unstated assumption in this judgment, as perhaps was also the case in Cadden, is that the accused did not touch the complainant. In my opinion, that view of the facts, adopted from Fairclough, inappropriately considers the accused to be a passive participant in the physical contact. Further, the judgment is founded upon the now-discredited view that an

assault requires a "hostile act". In McCormack, Fenlon Atkinson L.J., in language recently very endorsed by Singh L.J. in Price, described the line of cases following Fairclough as standing for the proposition that "where the accused adult invites a child, for example to touch him but exercises no sort of compulsion and there is no hostile act, the charge of indecent assault is not appropriate" (emphasis added).

- [28] In the period since Fairclough was pronounced in 1951, Canadian courts have repeatedly recognized assault as an offence against bodily integrity: see, e.g., *R. v. Cuerrier*, [1998] 2 S.C.R. 371 at paras. 11-12; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at para. 28. Judicial recognition that the assault scheme in the Criminal Code is designed to protect and promote bodily integrity and autonomy compels us to reject the view that an adult may engage in sexual contact with a child without assaulting the child so long as there is no open hostility. Because of the evolution in our conception of assault, and assault of a sexual nature in particular, since 1969, I do not regard McCallum as persuasive.
- [29] In Baney, the appellant had been convicted of indecently assaulting a 4-year-old boy on the basis that he had attempted or threatened, by an act or gesture, to apply force to the boy. The only evidence against the appellant was his own statement to the effect that he asked the child complainant to touch him and, when the child refused, he gave the complainant a dime and told him to leave.
- [30] Justice Brooke, writing for the court in allowing the appeal and quashing the conviction, referred to the line of cases including Fairclough before concluding at pp. 78-79:

Perhaps "attempt" as used in this section of the Criminal Code is wider in its meaning than the definition of a "battery" which is relied upon in the English cases. However, it is limited to acts and gestures and does not extend to simply an invitation to engage in a sex act even though he demonstrates his anxiety by exposing himself. This conduct, although insulting, is not an act done in an attempt to apply force to the person of the other. The evidence does not demonstrate that the appellant intended to touch the child or have the child touch him unless the child was willing to do so. The child who was but four years of age cannot, of course, consent to such an act so that his consent would not amount to a defence, but that is really quite a different issue than that which is involved here where the actual willingness of the complainant was for the appellant a necessary condition to the appellant engaging in the sex act which he desired.

[Emphasis added.]

- [31] The judgment in Baney turns on the words used in the Criminal Code to include in the definition of assault "attempts or threats by act or gestures". It is, as the passage above makes clear, not a case which involved actual sexual contact. Accordingly, it does not assist in determining what type of touching involving an accused constitutes an intentional application of force and, thus, an assault under s. 244(a) of the Criminal Code.

[32] Baney was considered by Cory J. (as he then was) in *R. v. Stillo* (1980), 56 C.C.C. (2d) 178, 1980 CanLII 2905 (Ont. S.C.), rev'd on other grounds 60 C.C.C. (2d) 243, 1981 CanLII 3313 (Ont. C.A.). He held, at 183:

The Crown takes the position that where the accused touches the person of a child under 14 years of age and where that touching as in this case, was indecent, the touching, however slight, amounts to use of force sufficient to constitute an indecent assault. Further, since the consent of a child under the age of fourteen is no defence to a charge of indecent assault, the requirement that there must be a hostile act sufficient in law to constitute an assault is vitiated. I agree with that contention.

[Emphasis added.]

[33] He also cited with approval the following passage from Smith and Hogan, *Criminal Law*, 4th ed (1978) at p. 416, found under the heading "The Requirement of an Assault":

There can be no assault unless D does something to P or acts so as to cause P to apprehend that D is going to do something to him. So in *Fairclough v. Whipp* D was acquitted where he invited a girl aged nine to touch his exposed person. The ratio decidendi of this case appears to be that an invitation to somebody to touch the invitor cannot amount to an assault. In *Burrows*, where the facts were similar except that the child was a boy, the court followed its earlier decision but added that the invitation could not be an assault

"because there was no hostile act towards the child, and, unless there is a hostile act there can be no assault".

This causes difficulty. In indecent assaults D's attitude to P will frequently not be "hostile" in the ordinary sense, but unduly affectionate. "Hostile", it is submitted, cannot mean more than against the will of P. But, if this is so, how can hostility be an essential element in an offence against a child under sixteen, where consent is irrelevant? Yet in *Director of Public Prosecutions v. Rogers* D was acquitted expressly on the ground of the absence of any hostile act though he did put his arm around his eleven-year-old daughter and led her upstairs in order that she should masturbate him. Lack of hostility was presumably also the ground of the acquittal in *Williams G. Gibbs*, where D took some little girls paddling and, in drying them, was guilty of conduct for which "every right minded person would feel disgust". These cases go well beyond *Fairclough v. Whipp*, for something was done by D to P. In holding that the action must be hostile, the court seems to have ignored the statutory rule that the child's consent is irrelevant. The Court of Appeal has now held in *McCormack* that an indecent act done to a girl of fifteen, with her consent and without hostility, is an indecent assault. It seems that the line of cases following *Fairclough v. Whipp* can be justified, if at all, only on the ground that the courts thought that nothing indecent was done by D to P. This was the approach of the Court in *Sutton* where it was held that the touching of naked boys under sixteen by D, who was taking pornographic photographs, was not indecent since the touching was merely to indicate a pose.

[Emphasis added.]

[34] Justice Cory concluded in *Stillo*, at 185:

In my view, there is an indecent assault of a person under fourteen years of age if there is an indecent touching of that person which would amount to an assault if consent were not given. The fact that the child consents to the touching of its person cannot, in light of the provisions of s. 140 of the Criminal Code constitute consent. There is no need for a hostile act under such circumstances. It may well be that by blandishments, or cajolery or flattery or offers of gifts or by representations that do not amount to fraud, a child may be enticed into giving consent to the touching of his or her body. A consent, given in such circumstances by a child is no consent at all.

Once the touching of the child is established then the English decisions, for example, *Fairclough v. Whipp* are clearly distinguishable. So too, the decision rendered by Mr. Justice Brooke in *R. v. Baney*, *supra*, is distinguishable for, in that case, there was no touching of the child by the accused. Indeed, Mr. Justice Brooke appeared to leave that very circumstance open for further consideration, when he said [at p. 78], "The child who was but four years of age cannot, of course, consent to such an act so that his consent would not amount to a defence."

[Emphasis added.]

[35] As Cory J. notes, and as I have emphasized, *Baney* clearly involved no touching. It cannot be said to be authority for adoption of the narrow definition of assault adopted in *Fairclough*.

[36] In its helpful submissions, the Crown points out that a series of cases on inconsistent verdicts stand as authority for the proposition that where a child touches an adult in a sexual manner in response to the adult's invitation to do so, both an invitation to sexual touching and sexual assault are established. In *R.V., Moldaver J.*, for the majority, wrote:

[51] Sections 151, 152 and 271 of the Criminal Code use different terms to describe similar acts. Sexual interference under s. 151 requires proof of touching, and invitation to sexual touching under s. 152 requires proof that the accused counselled, invited or incited the complainant to touch. Sexual assault, for its part, is not defined under s. 271. Instead, sexual assault is a s. 265(1) assault made applicable to sexual circumstances by s. 265(2). A person commits a sexual assault by applying force intentionally to another person, directly or indirectly, in circumstances of a sexual nature (Criminal Code, s. 265(1)(a); *R. v. Chase*, [1987] 2 S.C.R. 293, at p. 302; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 24).

[52] The word "force" is commonly understood to mean physical strength, "violence, compulsion, or constraint exerted upon or against a person" (*R. v. Barton*, 2017 ABCA 216, 55 Alta. L.R. (6th) 1, at para. 202, *aff'd* 2019 SCC 33, [2019] 2 S.C.R. 579, citing Merriam-Webster Dictionary (online)). However, as a legal term of art, the element of force has been interpreted to include any form of touching (*R. v. Guerrier*, [1998] 2 S.C.R. 371, at para. 10, *Ewanchuk*, at paras. 23-25; *R. v. J.A.*, 2011 SCC 288, [2011] 2 S.C.R. 440, at para. 23). Put simply, although the words "touch" or "touching" and "force" are distinct, in some circumstances, including those that apply here, they mean the same thing in law.

[53] Many cases demonstrate that instructions on the law of sexual assault when an accused is also charged with sexual interference or invitation to sexual touching is a source of bewilderment and confusion for juries (see, e.g., Tremblay; L.B.C.; J.D.C.; S.L.; K.D.M.). The question in the present case is whether the jury was correctly instructed on the relationship between the elements of force and touching.

See also: R. v. Tyler, 2015 ONCA 599 at paras. 10, 12; and R. v. K.D.M., 2017 ONCA 510 at paras. 33-39.

[37] There is, as the Crown submits, ample support in the jurisprudence for the view that any sexual contact by the accused with a complainant child amounts to the application of force by the accused to the complainant and, thus, to an assault--even if such contact might be said to have resulted from the complainant complying with the accused's invitation: see R.T.; R. v. Merkl, 2017 MBQB 129 at para. 57, aff'd 2019 MBCA 15, without addressing this question; and R. v. Monteath, 2022 ONSC 4851 at para. 85.

[38] Addressing a charge of sexual interference in R. v. Sears (1990), 58 C.C.C. (3d) 62, 1990 CanLII 10938 (Man. C.A.), Helper J.A. considered whether the appellant, who claimed to be the passive party to sexual contact, the "unsuspecting recipient of sexual advances by an aggressive child", had properly been convicted of sexual interference contrary s. 151 of the Criminal Code. He held, at 64:

In reading this section as a whole, it is clear that an accused who intends sexual interaction of any kind with a child and with that intent makes contact with the body of a child "touches" the child and is guilty of an offence. The section addresses not the instigator of the sexual conduct but rather the adult who for his or her own sexual purposes makes contact, whether as a primary actor or not, with the body of a child.

[39] The respondent contends that little weight should be placed upon sexual interference cases and that "there is a very principled reason why these cases do not apply to the offence of indecent assault, sexual assault, or assault simpliciter". He argues that "the focus of that offence [sexual interference] is on the contact itself and not on who initiated that contact". While the provision under consideration in Sears was more explicit in defining sexual interference as touching, for a sexual purpose, "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", it nevertheless requires "touching". The provision was interpreted purposively by the Manitoba Court of Appeal to include intentionally "making contact" for a sexual purpose, regardless of whose physical movement initiates the contact. In my view, the logic of that judgment is persuasive and equally applicable to an indecent assault case and, more specifically, to the underlying "assault" provision in the Criminal Code.

[40] As the Supreme Court noted in R.V., the requirement that there be intentional application of force for an assault to have occurred is satisfied by touching, however slight. In my opinion, such touching can consist of any intentional contact by an adult with the body of a child, regardless of whose physical movement initiates it. The analysis should not turn upon "who touched whom".

[41] In an annotation to Baney, Alan D. Gold dismisses a distinction based on the physics of the contact as meaningless and artificial. He writes:

The act-invitation distinction seems a mechanical, almost physicist's view of the meaning of "force": it differentiates between a force moving from the accused against the victim and one moving the other way, and it is based on the assumption that the impact, or threatened impact necessary to constitute an assault or battery, must be occasioned by the movement of some matter against or towards the victim. Besides being untenable on purely philosophical grounds as a rather artificial distinction (and even as a matter of physics it ignores that Newtonian Law which decrees that "for every action there is an equal and opposite reaction"), it is also contrary to those authorities holding that a battery may be committed where the impact is occasioned by the movement of the victim himself against some stationary matter, providing that the accused has intentionally caused the impact.

See Alan D. Gold, Commentary to R. v. Baney, available at 1971 CarswellOnt 41 (WL).

[42] The respondent nevertheless contends that for an assault to occur there must be some positive act on the part of the accused which is more than a mere invitation to touch his person. He says if indecent assault is defined as broadly as the Crown suggests then a sleeping adult who has their genitalia touched by a child will be found to have had sexual contact with a child, and will potentially be criminally liable. He says, on the Crown's view of the law, no act is required, which amounts to an absurdity. In my view, this is a straw man. No one suggests that a passive adult who does not initiate and intentionally participate in sexual contact will be found to have committed an indecent assault. Moreover, for there to be an assault under the Criminal Code, the application of force must be "intentional". The respondent does not explain how the requisite mens rea would be established in his hypothetical. The nightmare scenario assumes away the volition that is morally blameworthy.

[43] In my opinion, the jurisprudence supports the proposition that any intentional physical contact with a child may constitute an assault. Applying that interpretation of the law to the uncontroverted evidence in this case, there can be no doubt that the respondent assaulted the complainant under s. 244(a) of the Criminal Code, as it existed at the time of the offence. In suggesting the complainant touch him, the respondent precipitated contact of a sexual nature with the five-year-old complainant. That contact constituted a serious violation of the complainant's bodily integrity. The fact that it was the complainant who moved towards the respondent, and not the other way around, is irrelevant at law.

Conclusion and Remedy

- [44] For the reasons expressed, I would allow the Crown's appeal.
- [45] The Crown seeks an order, pursuant to s. 686(4)(b)(ii) of the Criminal Code, setting aside the acquittal and entering a conviction for indecent assault.
- [46] In order to substitute a conviction on an appeal from acquittal, "all the findings necessary to support a verdict of guilty must have been made, either explicitly or implicitly, or not be in issue": *R. v. Cassidy*, [1989] 2 S.C.R. 345 at 354-355; *R. v. A.E.*, 2022 SCC 4 at para. 2.
- [47] That test is met in this case. The trial judge expressly found that each of the other elements of the offence of indecent assault were not in issue:
- [13] There are five elements to the offence of indecent assault as set out in *R. v. Croft*, 22 A.R. 224: First, there must be an assault; secondly, the assault be in the circumstances of indecency; thirdly, there must be no consent; fourthly, the victim must be a female; and, finally, it must be established that it is the accused who is the criminal.
- [15] Identity is not an issue in this case. The complainant was five years old at the time, and thus she was unable to consent. She clearly identified as female in evidence. No issue was taken by the defence that the incident occurred in the circumstances of indecency. The only issue in this case is whether there was an assault.
- [48] On appeal, the respondent takes no issue with the trial judge's determination on this point. He agrees the only issue is whether or not his conduct amounted to an assault. That question has been answered in the affirmative by this Court. In light of that conclusion, I agree with the Crown that the undisputed facts support a conviction for indecent assault beyond a reasonable doubt, and that the appropriate remedy is to substitute a conviction pursuant to s. 686(4)(b)(ii).
- [49] Accordingly, I would set aside the acquittal, enter a conviction in its place and remit the respondent for sentencing.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Madam Justice Griffin"

I agree:

"The Honourable Mr. Justice Voith"

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/ca/24/02/2024BCCA0283.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-r-a-2024>

Prepared on 28 October 2026 · Esheria