
CANADA / JUDGMENT

R. v. S.D.

2022 BCSC 2305

COURT

Supreme Court of British Columbia

DECIDED

18 November 2022

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2022 BCSC 2305 R. v. S.D.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. S.D.,

2022 BCSC 2305

Date: 20221118

Docket: 42399

Registry: Courtenay

Rex

v.

S.D.

Restriction on Publication: Pursuant to s. 486.4(1) of the Criminal Code, no information that could identify the complainant shall be published in any document or broadcast or transmitted in any way.

Before: The Honourable Mr Justice Crerar

Oral Reasons for Judgment

Gardiner hearing ruling

Counsel for the Crown:

N. Grabe

Counsel for the Accused:

S. Runyon

Place and Dates of Trial:

Courtenay, B.C.

November 14-18, 2022

Place and Date of Judgment:

Courtenay, B.C.

November 18, 2022

I. INTRODUCTION

- [1] S.D. stands charged with one count of sexual assault contrary to s. 271 of the Criminal Code, RSC 1985, c. C-46. The charge is based on a single assault that occurred on the night of March 13-14, 2018. The complainant reported the assault on February 26, 2019. S.D. gave a voluntary statement to the Comox Valley RCMP on March 17, 2019. He was charged on April 9, 2021.
- [2] S.D. pleads guilty to the charge of sexual assault. He accepts that the complainant could not consent to sexual activity while asleep, as she was at the time: see *R. v. J.A.*, 2011 SCC 28 at para. 66, and *R. v. Barton*, 2019 SCC 33 at para. 107. He disputes, however, the alleged degree of sexual contact: while the complainant alleges that he vaginally penetrated her with his penis while she was sleeping, he claims that he only touched her breast and outer vaginal area with his hand. He puts the Crown to its obligation to prove this central disputed fact beyond a reasonable doubt: *R. v. Gardiner*, [1982] 2 SCR 368.
- [3] S.D. and the complainant each testified in the Gardiner sentencing hearing. S.D.'s mother also testified.
- [4] As set out below, the testimony of both S.D. and the complainant suffered from credibility challenges that went beyond those posed by the long passage of time between the assault, the police interviews, and this trial. Despite her obvious motivation to help her son, the Court found the mother to be a credible and balanced witness. For example, the mother, a pediatric nurse, credits the complainant with being a generally good mother, despite the accusations the complainant levels against her son.

II. facts

- [5] The evidence of S.D. and the complainant were in stark opposition.
- [6] We will start with some undisputed facts. The parties became romantically involved around December 2016, when S.D. was around 22 years old. They dated for some four months, and then broke up; three months later the complainant advised him she was several months pregnant. They then moved together into S.D.'s mother's unfinished two-bedroom basement suite. Next, they shared an apartment in Parksville. Just before the birth of their child in October 2017, they moved back to live in the mother's house, by which time the basement

suite had been finished, with two bedrooms, a living room, a kitchen, and laundry room.

- [7] They disagree about their living arrangements in the mother's home, and specifically their living arrangements at the time of the assault.
- [8] The complainant insists that she lived alone in the mother's basement suite with their young child. She says that S.D. resided and slept in his old bedroom, upstairs, or, at other times, at his father's house. S.D. would visit the basement suite from time to time, to play with their child, and occasionally to share a meal or to watch a movie together.
- [9] In contrast, S.D. testified that he and the complainant lived together in the basement suite. They shared a bed. They carried out day-to-day parenting duties together. He kept his clothes and possessions in the suite. From time to time, when the complainant needed space, he would sleep upstairs in his old room. For the most part, however, they lived together in the basement.
- [10] The mother was living upstairs in the same house the entire time. She testified that from autumn 2017 to August 2018, S.D. and the complainant lived together, as a couple, in the basement suite. She confirmed that occasionally her son would sleep in his own room upstairs when the two were having difficulties. Her own bedroom is directly below his, and she notes that she would have been aware if he had been staying in his old bedroom for extended periods of time.
- [11] She confirmed that the complainant continued to live in the basement suite some four months after the assault, moving out around August 2018.
- [12] There is general agreement between the complainant and S.D. on the nature and history of their relationship. Their evidence, together, indicates that their relationship was tumultuous, often interrupted, and that it would be difficult to delineate precisely when they considered themselves, and when they could objectively be considered, to be a romantic couple or not.
- [13] The complainant first stated that she was "not sure exactly" about their relationship status in early March, but that they "weren't in a relationship" at the time of the assault. In cross, when asked if they might have been in relationship the day before the assault, she then said that "I don't exactly remember. I don't think so. It was very on and off."
- [14] S.D. acknowledged that by March 2018, the status of their relationship was in flux. They were no longer presenting themselves as girlfriend and boyfriend. That said, they continued to engage in intermittent sexual intercourse. Around the time of the assault, they were discussing reconciliation, and a return to a more formal girlfriend-boyfriend status: in S.D.'s words, "we were trying."

- [15] The complainant acknowledged that the relationship continued to some extent, still in an off and on manner, for several months after the assault. She said that they "tried to make it work," and that it continued to be "on and off." By early 2019, the relationship had broken down entirely, due in part to S.D.'s acknowledged excessive consumption of drugs and alcohol.
- [16] I pause here to acknowledge that the Court, in this case of domestic sexual assault, must not place excessive weight on the fact that the complainant continued to live in the basement suite, or continued to be involved romantically to some extent with S.D. after the assault. This is especially so given that the complainant and her young child relied upon S.D. and his mother for economic support, and a roof over their heads.
- [17] S.D. said that in their years together, it was a common occurrence for him to test the waters for sexual activity by touching the complainant while she was sleeping. He said that this was a mutual practice: from time to time, the complainant would also touch him sexually while he was sleeping, as a way of seeking to initiate sexual activity.
- [18] The complainant was asked both in direct and cross-examination whether she had ever tried to initiate sex with S.D. by fondling him while he was sleeping. In direct, she said "I don't recall any specific instances when that happened," and that she had "no recollection" of that having occurred several times a week. In cross, she said, six times, "I don't recall that", and "I don't recall what happened throughout our relationship." She said so emphatically each time: perhaps a little too emphatically, and in a manner that came off as too deliberate and rehearsed and artfully phrased. While the parties may reasonably strain to recall specific events occurring four or five years ago, it was odd that she could not provide a more categorical answer about a sexual practice alleged to have regularly occurred over a relationship lasting several years. In any case, S.D.'s allegation that the complainant would from time to time touch him sexually while he slept, as a means of initiating sexual contact, is uncontradicted on the evidence.
- [19] That said, S.D.'s testimony on this point was also unsatisfying, as emphasised by the Crown. He went from a general assertion that on a regular basis each of them fondled each other sexually while the other was sleeping in order to initiate sex, to a repeated artificial, adamant, didactic, and seemingly rehearsed insistence that he would only kiss and touch her over, and not under, her clothes in order to try to initiate sex. In other words, the night in question was the first time he had ever touched her breast or vaginal area in order to test the waters for sex. S.D.'s somewhat artificial testimony perhaps reflects the realisation, perhaps mutual, that every such touch would itself constitute a sexual assault, in the same manner as the present charge to which he is pleading guilty.
- [20] I turn to the assault, where their testimony is most fundamentally and importantly opposed.
- [21] According to S.D., they had spent the evening in question sitting on the couch, watching a movie. Her legs were on his. From time to time they kissed and cuddled. At some point she said that she was going to bed; S.D. said that he would continue watching the movie. He

claims that there was no conversation one way or the other about having sex later. After the complainant went to sleep, S.D. entered the bed. In his version, he sought to initiate sex by touching her breast, and pulling her panties down slightly, and touching the exterior of her vagina. He also said that he kissed her a few times.

- [22] The complainant woke up, and expressed anger. She said "no". He apologised, left the room, and slept on the couch. The next morning he again apologised.
- [23] According to the complainant, she and S.D., along with a friend, had gone shopping that day. That evening, S.D. had come downstairs to visit their child. He then went back upstairs, while the complainant gave their child a bath and put her to sleep. She claims that S.D. texted her, asking if he could come down and watch a movie with her; she claims that she responded with words to the effect of "okay, but don't try anything." She said that he texted back, reassuring her that he would not.
- [24] In her statement, she told the police that she possessed these texts. But she has never produced those texts, either to the police, or in these proceedings. She says that she was unable to produce these texts as her phone was "smashed" at some unspecified time; she apparently has not been able to retrieve those texts electronically from her telephone provider or from a backup or otherwise.
- [25] She agrees that they watched a movie, sitting beside each other on the couch, but denies cuddling or kissing. She was very tired, and started to fall asleep. She woke up when he tried to cuddle her. She said words to the effect of "no - - we are not doing this." He stopped. They continued watching the movie. She said that she felt very tired, and was going to bed. She says that she turned off the television, and asked him to go upstairs. She then went into the bedroom, and went to bed; she is not aware if he actually went upstairs. She fell asleep, but was awakened by the movement of blankets. She said "no - - go upstairs - - I'm not cuddling." She saw him leave, leaving the door open a crack. She fell back asleep.
- [26] She was then awoken again by the physical sensation of breathing on her neck. She says that S.D. was behind her, engaged in vaginal intercourse with her. His hands were around her knees, pulling her back, while he thrust himself inside her. She turned around and pushed him on the chest. She said "get off me, leave." S.D. stopped, and started apologising. The complainant walked him to the door - - she doesn't remember whether it was the door to the upstairs or to the outside of the house - - and he left the suite. Her testimony matches that of S.D. with respect to him apologising the next day.
- [27] The complainant told the police and testified that after the assault she tied a rope to the door handle, to bar entry. At trial, she was vague on whether she had tied it to the closet handle, or perhaps to a chair. If it was in fact tied to the closet door handle, it would be difficult and ineffectual, given the round shape of the handle, and the seeming flimsiness of the closet door.

- [28] The Crown emphasised that in his police statement S.D. said that he touched the complainant's breast and vaginal area, but omitted to state that he had kissed her, as he stated in his testimony this week. The Court places no great weight on this omission. In his police interview, S.D. was being questioned out of the blue about an alleged sexual assault alleged to have occurred a year previous. While in theory a kiss may constitute a sexual assault, for someone like S.D., being interviewed by police for the first time about a sexual assault occurring a year previous, kissing would not seem to be the likely focus of a sexual assault complaint or police inquiry. Further, in any case, it is a reasonable omission given the passage of time.
- [29] For what it is worth, the mother, who was upstairs the night of the assault, was not aware of anything occurring downstairs. She did not learn about the assault allegation until September 2019.
- [30] After the relationship broke down permanently in early 2019, the complainant obtained an ex parte restraining order, preventing S.D. from approaching her or their child. That restraining order was set to expire in June 2019. Defence conjectured in cross and argument that this was the impetus for the sexual assault complaint. Defence also pointed to the mother's evidence of the complainant showing erratically hyper-possessive behaviour with respect to the child: for example, berating the mother and the aunt for allowing the child to go on a swing at the playground in her absence.
- [31] S.D. has not seen their child since autumn 2018. The mother and the aunt have also been denied access since 2020. Their overtures for visits or family mediation have been ignored by the complainant.

III. law

- [32] Sexual assault proceedings are notoriously difficult to determine. In *R. v. E.A.G.*, 2020 BCSC 1691, Madam Justice Warren describes this difficulty, and sets out the legal process to be carried out by this Court today:

The application of reasonable doubt in sexual assault cases

- [185] Sexual assault cases often involve "he said/she said" scenarios, where the complainant and the accused are the only witnesses to the alleged criminal conduct. In these kinds of cases, it is vitally important that judges do not decide that an accused is guilty merely because the judge concludes that the complainant's version of events is more likely to be true. In other words, a criminal trial is not a credibility contest in which an accused must present a more credible version. Deciding a "he said/she said" case merely on the basis of which version is more likely to be true would misapply the burden of proof on the Crown to establish guilt beyond a reasonable doubt. The correct application of the burden of proof requires the judge to acquit the accused if the evidence as a whole raises a reasonable doubt about guilt. In other words, it is possible that a judge might find the complainant's version of events to

be more believable but still have a reasonable doubt about what actually happened. In that situation, the benefit of the doubt must go to the accused.

[186] To assist in the proper application of the burden of proof in this kind of case, the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 recommended that the following framework be used in order to ensure the burden of proof remains on the Crown:

- a) if the evidence of the accused is believed, he must be acquitted;
- b) if the evidence of the accused raises a reasonable doubt, even if some or all of it is not believed, he must be acquitted; and
- c) if the evidence of the accused does not raise a reasonable doubt, it must be determined whether the guilt of the accused has been established beyond a reasonable doubt by the evidence that is accepted.

[187] A fourth consideration has also been articulated: if, after careful consideration of all the evidence, I am unable to decide who to believe, I must acquit: *R. v. C.W.H.* (1991), 68 (3d) 146 (B.C.C.A.).

IV. decision and discussion

[33] This difficulty is particularly acute in the present case, where the assault occurred 4.5 years ago, and the facts in question stretch back almost six years ago, and where a year has passed between the assault and the police interview, and three years has passed between the assault and the charge.

[34] Further, the Court does not have the assistance of photographs or other evidence that might corroborate the assertions of the parties with respect to their living arrangements. In this smart phone age, there likely exist many date-stamped smart phone photographs of the newborn child and then toddler in the basement suite, that might illuminate the issue of whether S.D. resided in the basement suite, and the status of their relationship. Presumably, there were also friends or relatives that visited the basement suite to see the child from time to time and who could have testified as to these issues. The Court is left with the largely contradictory testimony of these three witnesses.

[35] Once again, in the Gardiner hearing, the Crown bears the burden of proof of establishing, beyond a reasonable doubt, disputed aggravating facts. As set out above, there were difficulties with the content and manner of the complainant's testimony, as well as plausible ulterior motivations for the complaint. Applying *R. v. W.(D.)*, [1991] 1 SCR 742, the Court is not convinced, beyond a reasonable doubt, of the facts of the assault as asserted by the Crown.

- [36] The Court is left with the account of the assault as admitted and recounted by S.D.: after a social evening of watching a movie together on the couch, he touched the complainant's breast and vaginal area, without her consent, while she was sleeping, in a bed, in a suite that they shared, while their child slept in the next room.
- [37] The Court also accepts that each of S.D. and the complainant would from time to time touch the other person sexually, while they were sleeping, as a means of attempting to initiate sexual activity. This did not occur to the extent alleged by S.D., but did occur frequently enough to form a pattern in the relationship.

"Crerar J"

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