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00-00635B
Registry: Whitehorse

R. v. Glada, 2003 YKTC 8

IN THE TERRITORIAL COURT OF YUKON
(Before His Honour Chief Judge Lilles)

REGINA

v.

JOSEPH GLADA

Leigh Gower

Appearing for Crown

Robert Dick

Appearing for Defence

REASONS FOR JUDGMENT

[1] LILLES C.J.T.C. (Oral): This matter was heard a week ago. At that time certain admissions and pleas were entered. There remains one outstanding issue and that related to the charge of sexual assault. I am in a position to make that decision and give my reasons therefore.

[2] Joseph Glada is a 38 year old, First Nations man from Ross River. His common-law partner for nine years was L.C. Together they had two children, and also raised a third. This relationship came to an end in November of 2000. Ms. C. now lives in Whitehorse. From time to time when Mr. Glada came to Whitehorse, he would visit his children who lived with Ms. C., and occasionally he would stay at her house, sleeping on a couch in the living room.

[3] Although their relationship was at an end, Ms. C. acknowledged several instances of intimacy or sexual relations with Mr. Glada after the separation.

[4] Mr. Glada entered guilty pleas to all but one of the charges before the court. He accepted responsibility for assaulting Ms. C. between January 16, 2002 and October 3, 2002.

[5] Ms. C. described two specific assaults. During the summer she was talking to a girlfriend on the telephone and laughing from time to time. Mr. Glada came downstairs and hung up the phone on her. She told him she was talking to a girlfriend and called her back. Shortly thereafter he came by and backhanded her in the face, leaving a bruise. On another occasion, during the same time period, they were sitting at the kitchen table talking about the relationship, suddenly he got very angry and grabbed her by the throat and pushed her. She fell down and hit her head on the floor. She said she was almost knocked out. She testified that during this time, Mr. Glada exhibited a lot of jealous behavior.

[6] There were other assaults by him on her involving slapping, choking and pulling hair.

[7] During the time period January 16, 2002 and October 3, 2002, Mr. Glada was on probation. The assaults described above breached the term of his probation order to keep the peace and be of good behavior, an offence contrary to s. 733.1(1) of the *Criminal Code*. As I understood it, those offences were admitted by Mr. Glada during our last hearing.

[8] Mr. Glada was also charged with committing a sexual assault on Ms. C. on

October 3, 2002, contrary to s. 271 of the *Criminal Code*. Mr. Glada entered a guilty plea to a simple assault contrary to s. 266. This plea was not accepted by the Crown.

[9] After hearing evidence from both Ms. C. and Mr. Glada, I find the following facts.

[10] Mr. Glada had visited his children in Whitehorse on October 2, and returned to Ms. C.'s residence late that evening. She allowed him to stay overnight, sleeping on the couch. After she returned to her own bedroom, Mr. Glada came into her bedroom fully dressed. Ms. C. was also fully dressed. He asked her for sex. When she said no, he asked for oral sex, but again, she declined. She explained to him that the relationship was over, she did not want any form of sex with him and that the only thing they currently have in common is their children.

[11] According to Ms. C. during examination-in-chief, this conversation continued for five to ten minutes before Mr. Glada became angry. Later, I understood her to say that the time period may have been shorter. According to her, Mr. Glada complained that she, C., had engaged in sex with other men, but was reluctant to have sex with him.

[12] Mr. Glada later testified that he had asked her whether she had safe sex with the other men, as he was concerned about HIV and hepatitis C. According to him, she told him that it was none of his business.

[13] On cross-examination she remembered that Mr. Glada had asked her why she had had sex with him after they had split up. She had answered that it was easier to

give in to his demands and not have the children wake up and because she felt sorry for him. Mr. Glada said that when she said she felt sorry for him he became angry, threatened her and punched her.

[14] The threat Mr. Glada uttered prior to punching Ms. C. in the head, was to this effect:

Don't look at me like that or I'll beat you up good.

When he said this, he had his fist in the air, cocked so as to hit her.

[15] Mr. Glada admitted this threat which constitutes Count 2, setting out an offence contrary to s. 264.1(1)(a) of the *Criminal Code*.

[16] After Mr. Glada punched Ms. C., he went upstairs and back to sleep on the couch. She went to the bathroom and then returned to her room. After a while she decided to call the police.

[17] She left the house and made the call from a pay phone. The police attended and arrested Mr. Glada without incident.

[18] There is some uncertainty in the evidence as to how long the incident in C.'s bedroom lasted, and how long after he had asked C. for sex, that Mr. Glada punched C.

[19] I find that the entire incident probably lasted no more than 10 to 15 minutes. It is clear that Mr. Glada asked her for sex at the very beginning of the incident. When she declined, the evidence indicates that he did not pursue the matter.

[20] He punched her sometime later, perhaps as soon as three minutes, but probably closer to ten minutes later, after the focus of their discussion had changed. It is more likely that Mr. Glada became very angry when she told him that the reason she had sex with him was that she felt sorry for him, and that is why he then struck her.

[21] The issue that I must decide, is whether, if in these circumstances, taking into account the nexus between the punch and Ms. C.'s refusal to have sex with Mr. Glada, whether the assault constituted a sexual assault contrary to s. 271 of the *Criminal Code*.

[22] The Supreme Court of Canada considered the definition of sexual assault in *R. v. Chase*, [1987] 2 S.C.R. 293. In that case, the accused entered the home of a 15 year-old girl, without invitation, seized her around the shoulders and arms and grabbed her breasts. When she resisted he said:

Come on dear don't hit me, I know you want it.

[23] The Court of Appeal had held as there had been no genital touching, the accused's actions did not constitute a sexual assault. The Supreme Court of Canada reversed and allowed the appeal, stating that a sexual assault is an assault committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test is an objective one:

"Viewed in the light of all of the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer." The part of the body touched, the nature of contact, the situation in which it occurred, the words and gestures accompanying the act, and all the circumstances surrounding the conduct, including threats

which may or may not be accompanied by force, will be relevant. [His] intent or purpose as well as his motive, if such motive is sexual gratification, may also be factors in considering whether the conduct is sexual.

[24] The Court also held that the offence of sexual assault requires general intent only.

[25] *R. v. Alceus* (2000), 151 C.C.C.(3d) 91 (Que. C.A.), is helpful in understanding the required nexus between the assault and the sexual aspects that would result in a conviction for sexual assault. In that case, the accused struck the complainant twice when she refused to perform fellatio on him.

[26] In finding the accused guilty the court stated:

The bedroom setting, the ongoing sexual activities, the words accompanying the assault, and the undisputed nexus between the sexual gratification demanded and the refusal to "deliver the goods" persuade me that "the sexual or carnal context of the assault is visible to a reasonable observer."

I am satisfied as well, that the respondent assaulted the complainant "in circumstances of a sexual nature such that the sexual integrity of the victim was violated."

[27] The facts of the case at bar differ in several material respects from the facts in *Alceus, supra*.

1. The demand for sex is separated in time, some three to ten minutes from the punch to C.'s head .
2. Viewed objectively, Mr. Glada accepted C.'s refusal to have sex and did not persist in demanding it.
3. The threat uttered by Mr. Glada just prior to striking C. was not related to his earlier demand for sex and her refusal.

4. After C.'s refusal to have sex with Mr. Glada, the conversation still had to do with sex, but he was no longer demanding sex. He was expressing concern about the risk to him should she have had unprotected sex with other men.
5. He became angry and struck her in the face when in reply to his question, she said she continued to have sex with him after the separation, because she felt sorry for him.

[28] In my opinion, the nexus between the assault and the request and the refusal to have sex is insufficient to render the assault a sexual one within the meaning of s. 271 of the *Code*.

[29] The initial refusal to have sex may have contributed to the emotional state of Mr. Glada, when some minutes later he struck C. I am satisfied that viewed both objectively and subjectively, it was not a significant factor in the assault.

[30] The facts of this case also differ from a number of cases where the victim was touched in circumstances which, viewed objectively, rendered the contact sexual. I have reviewed the following cases: *R. v. O.D.J.*, [1993] Y.J. No.37 (S.C.), *R. v. K.B.V.*, [1993] 2 S.C.R. 857, *R. v. Carey*, [1993] S.J. No.167 (C.A) and *R. v. Robicheau*, [2001] N.S.J. No. 113 (C.A.).

[31] Unlike these cases, the case at bar is not a case where the sexual integrity of the victim was violated. Although not determinative, the victim in her evidence did not characterize the assault as having a sexual character.

[32] The motive of the accused, while merely a factor, was not a sexual motive.

[33] In the result with respect to Count 1, alleging an offence contrary to s. 271, I find Mr. Glada guilty of the included offence of assault contrary to s. 266 of the *Code*.

[34] Finally, Mr. Glada has also entered a guilty plea to a one count Information alleging that he failed to comply with his probation order by not reporting as directed to the Family Violence Prevention Unit, contrary to s. 733.1(1) of the *Code*.

[35] In summary, I find Mr. Glada, guilty of the following offences:

1. October 3, 2002 an assault on L.C., contrary to s. 266 of the *Code*.
2. October 3, 2002 uttering a threat to cause L.C. bodily harm contrary to s. 264.1(1)(a) of the *Code*.
3. Between January 16, 2002 and October 3, 2002, assault on L.C. contrary to s. 266 of the *Code*.
4. Between January 16, 2002 and October 13, 2002, breach of probation by virtue of failing to keep the peace and be of good behaviour contrary to s. 733.1(1).
5. Between August 19, 2002 and September 13, 2002, for breach of probation, namely failing to attend the Family Violence Prevention Unit as directed contrary to s. 733.1(1) of the *Criminal Code*.

LILLES C.J.T.C.