

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

HER MAJESTY THE QUEEN

AND:

THOMAS MOSES HARPER

**REASONS FOR JUDGMENT OF
MR. JUSTICE VEALE**

INTRODUCTION

[1] Thomas Harper is charged with sexually assaulting the complainant on November 18, 2000. The complainant suffers from a severe and disabling form of multiple sclerosis, which affects her both mentally and physically.

[2] There are two principal issues:

1. Did a sexual act take place between the accused and the complainant on November 18, 2000?
2. Did the complainant consent?

THE FACTS

[3] The complainant is a young woman who resides at Macaulay Lodge in Whitehorse. The Lodge is a 50-bed continuing care facility. The residents range from 19-year old stroke victims to elderly patients with dementia. The building consists of two stories and has an elevator.

[4] The complainant was diagnosed with multiple sclerosis in 1994, following the birth of her second child. She suffered a severe attack which left her in a fetal position with spasticity of her upper and lower limbs. She was blind and unable to talk. She survived only with the insertion of feeding tubes.

[5] She has recovered to some extent. At one time, she could walk with a walker and assistance. Since at least the date of this charge, she has been unable to walk and is confined to a wheelchair and rests in her bed. She is incontinent and her eyesight is extremely poor. She can recognize objects but they must be in a range of several feet from her. She hears and speaks well.

[6] I ruled that she was capable of testifying. I ordered that she be permitted to testify at Macaulay Lodge to reduce the trauma that could occur. Medical evidence indicated that she would function better in familiar surroundings with her care worker present.

[7] Dr. Anzarut is her treating neurologist. He specializes in the treatment of multiple sclerosis. He describes her as having been terribly affected by the disease. He says the complainant has no memory that she can rely on, except for some remote memory. Dr. Anzarut testified that she has diffuse brain damage which has affected her ability to

remember things from one day to the next. She is childlike in her behaviour and, at times, completely uninhibited. Dr. Anzarut finds her totally unreliable in giving answers when he examines her. He obtains her case history from her parents and care workers but he acknowledges that he examines her in his hospital clinic rather than at Macaulay Lodge, a familiar environment where she might fare better. He also suggested that the complainant does better with her mental status at Dr. Macdonald's office, a more familiar place than his clinic.

[8] Dr. Macdonald is the treating physician of the complainant. She is more familiar with the complainant's condition as she sees her on a more regular basis than Dr. Anzarut, who resides in Vancouver.

[9] Dr. Macdonald says the multiple sclerosis has affected the complainant physically, cognitively and emotionally. She says the cognitive function of the complainant deteriorates when she is out of her routine and controlled environment. She routinely medicates the complainant so that she will be relaxed and under less stress for clinic, hospital or lab visits.

[10] It is interesting to note that staff at Macaulay Lodge say the complainant is capable of remembering some important things for a few days although some things could be remembered for just a few hours.

[11] The complainant's routine at Macaulay Lodge involves getting up by 10:00 a.m. and getting dressed. She is capable of dressing herself, although on some days she might require assistance. She is able to get into her wheelchair but a care worker is present to assist.

[12] Her usual routine is to go downstairs and have a cigarette and coffee. She has lunch and then returns to her room at 1:00 p.m. for a rest. She typically lays on her back on top of her bedcovers with a light blanket or draw sheet over her. She wakes up or is woken up between 4:00 and 5:00 p.m. when she goes to the dining room for supper.

[13] At the time of the incident, she lived in Room 34, which is on the second floor of Macaulay Lodge. The room is approximately 12 feet by 12-14 feet with an ensuite bathroom. Room 34 is not on the main corridor of the second floor. It is down an alcove which starts approximately 11 feet from the top of the stairs and elevator area.

[14] Thomas Harper and the complainant are not strangers. Harper visited the Lodge almost daily, prior to the incident, to see his mother who was a resident in a room on the second floor. There was no requirement for Harper to pass by the door to the complainant's room in order to visit his mother.

[15] The Lodge operated on an unlocked door policy during visiting hours, both for the entrance to the Lodge and the rooms of residents. Visiting hours were generally 8:00 a.m. to 9:00 p.m. with some flexibility as circumstances required. There are three staff shifts. The day shift is from 6:45 a.m. to 2:45 p.m. with seven staff on duty. The evening shift is from 2:45 to 10:45 p.m. with six staff on duty. The night shift is from 10:45 p.m. to 6:45 a.m. with three staff on duty. The staff routine for the evening shift is to come on shift at 2:45 p.m. and have a meeting in the report room to listen to a tape prepared by the previous shift. This was an important briefing on the events of the past shift which would inform the new shift. It generally took 15 – 20 minutes and at this time the staff floor coverage would be minimal. However, room 34 had two bells; one by the bedside

for calling staff and the other in the bathroom. The latter was called the emergency bell because it rang faster and louder and could be heard anywhere in the building.

[16] The staff were very aware that the complainant was attractive and sometimes followed by other male residents. She was known to be uninhibited and sometimes too friendly toward males. The complainant had some previous contact or association with Thomas Harper at the Lodge during his visits with his mother. The staff were concerned about the appropriateness of the contacts and some written “expectations” were prepared and explained to Thomas Harper to ensure that he had appropriate contact with the complainant. The specific “expectation”, of interest to this case, is the following:

Thomas is not permitted to loiter in the coffee room if his mother is not with him ie. monitor and discourage his visits with (complainant) if it seems inappropriate.

[17] This is contained in a letter that was carefully explained to Thomas Harper.

[18] I now turn to the complainant’s evidence at trial. It was both contradictory and incomplete. She was able to hear and speak clearly without trauma and often had questions for her examiners. When asked how old she was, she gave her age as 26 and asked, “Am I wrong?” At her capacity inquiry she said she was 37 and her birth date was January 20, 1968, which is her correct birth date. She knew she lived at Macaulay Lodge but she did not know for how long or when she first came to live there. When asked what floor of the two-floor lodge we were on, she said, “On the third floor. Is that right? Second? First?” Her evidence was heard on the second floor. She said her room number was 13 and that she had always been in that room. She then remembered that she had been upstairs and guessed that the room number was 21.

She did not remember that her room number at the time of the incident was 34. She did not know when she moved from Room 34 and could not remember her present room number, which she had previously said was 13.

[19] When asked by the Crown if something happened in the room she was living in before, she replied, "Nothing happened in that room." She said it was the year 2003. She could not remember something important happening in the year 2000. She had difficulty distinguishing between winter and spring. It is important to note that the Crown was limited to asking open-ended questions rather than leading questions.

[20] She could not remember something happening to her at Macaulay Lodge. She did remember going to the police station quite a while ago but not why. She said she knew someone named Thomas who visited her. When asked, "Did he ever visit you?" she answered, "I don't know." When asked when she last saw Thomas, she answered, "I don't know, either." She knew that Thomas was native and that his mother lived in the building.

[21] When cross-examined, and leading questions were asked, the complainant was asked if she remembered Thomas doing something to her that she didn't like. She replied, "He had sex with me." I set out what followed:

Q And do you remember talking to people about that?

A I talked to my mom about it.

Q Do you remember talking to some of the staff about it?

A Probably.

Q Do you remember talking to police officers about it?

A Mm-hmm.

Q Do you remember a police officer coming to Macaulay Lodge here to talk to you about that?

A Probably.

Q Do you remember telling that police officer that you had asked Thomas to have sex with you?

A (No audible response)

Q Would there have been any reason that you could think of why you might have said that?

A I don't know.

Q. Okay.

[22] The Crown approached the issue again:

Q The gentleman asked you if you remember Thomas doing something that you didn't like, and you said, "He had sex with me."

A Like, forced me to have sex with him.

Q Why didn't you like it?

A I don't remember.

Q And how did he force you?

A Hmm?

Q How did he force you?

A He never forced me at all.

Q And –

A How old is he?

Q I don't know. Do you know when it is that he – do you know when this happened?

A When it happened? It was a while ago. What did you write down?

Q "While ago." And do you remember how it happened or what happened?

A I don't know.

Q Did you want to have sex with him?

A Yeah, sure.

[23] I ruled that a number of out-of-court statements made by the complainant to caregivers and a police constable were admissible, based upon necessity and threshold reliability, for the purpose of establishing the truth of their contents. When I outline this evidence it is for the purpose of establishing what was said. I found the witnesses who reported this evidence to be credible and reliable.

[24] Donna Organ, a licensed practical nurse, had just come on shift at about 3:00 p.m. She was listening to a taped report of the previous shift when she heard the complainant's emergency bell ring shortly after 3:00 p.m.

[25] Donna Organ took the stairs to the second floor to reach the complainant in Room 34. She had to unlock the door to the complainant's room, which was unusual as she usually left the door ajar. The complainant was sitting in her wheelchair dressed in a shirt and a pair of panties. She said, "I just got fucked by a native guy – that Thomas guy." Donna Organ testified that these were the exact words of the complainant.

[26] Donna Organ knew the complainant was referring to Thomas Harper who was sitting down the hallway by the elevator. She described the complainant as upset and shaking, in a manner more than her usual tremor.

[27] Donna Organ left the room to take Thomas Harper downstairs and eventually out of the Lodge. She returned within five minutes and entered the complainant's room with

Pamela Phillipsen, a registered nurse, who was the staff nurse at the lodge. The complainant repeated in the presence of Donna Organ and Pamela Phillipsen that a native guy fucked her. Donna Organ testified that she asked the complainant if she wanted it to happen and the complainant said that she didn't want it to happen and that she had been sleeping. Donna Organ could not remember this latter portion of the complainant's response word for word and was paraphrasing.

[28] Pamela Phillipsen paraphrased what she heard from the complainant into more refined language. She testified that she asked the complainant if the sexual intercourse had happened. The complainant confirmed that it had. The complainant, in response to her questions, said that she did not invite Thomas Harper into her room and that she was not willing to have sex with him.

[29] Pamela Phillipsen confirmed that the complainant was really shaking, more so than her usual condition. The complainant asked for a cigarette and was taken downstairs.

[30] Donna Organ observed a wet incontinence pad on the floor and pants and panties on the bed. The whole room smelled strongly of alcohol and she opened the window to let fresh air in. The complainant did not smell of alcohol but Thomas Harper did smell of alcohol.

[31] Pamela Phillipsen described the complainant's room as being in disarray.

[32] Lori O'Donnell is a licensed practical nurse, who was starting her shift at 3:00 p.m. on November 18, 2000. She answered the complainant's emergency bell first and

found the door to her room locked. She did not enter the room until after Donna Organ had unlocked the door, entered and then left the room to bring Pamela Phillipsen.

[33] She testified that the complainant said to her, "A native guy fucked me." O'Donnell asked if she invited him in and the complainant said, "No, there wasn't much I could do." She had a look of disgust on her face, but was not upset.

[34] Lori O'Donnell said that the complainant was flushed and shaky. Her pad was on the bed with discharge and pubic hair. Her pants and panties were also on the bed and the room smelled of alcohol, which was not from the complainant.

[35] Lori O'Donnell was only there for two minutes and left when Donna Organ returned with Pamela Phillipsen. She observed Thomas Harper before he was taken away and said he appeared to be intoxicated and smelled of alcohol.

[36] Elaine Senkpiel is a registered social worker. She works part-time at Macaulay Lodge. She has been at Macaulay Lodge for six years and has been the complainant's social worker since 1995. She has seen the complainant informally on a weekly basis and formally as required.

[37] Pamela Phillipsen called Elaine Senkpiel at home shortly after 4:00 p.m. She arrived at Macaulay Lodge at 4:30 p.m.

[38] The complainant was sitting in her wheelchair near the entrance when Elaine Senkpiel arrived. When she arrived the complainant said, "So glad you're here." She described the complainant as tremulous and shaking all over, unlike her normal spasms, which she described as discrete movements.

[39] Ms. Senkpiel asked the complainant if she would like to talk and asked her how her day was. The complainant replied, "That Thomas." The complainant said that she was in her room lying on her bed half asleep. Thomas came in without knocking. He had been drinking. He pulled down his pants and removed her clothes and incontinence pad. The complainant said, "He pumped his dink against my bum" and put his hand inside her.

[40] Elaine Senkpiel asked the complainant if she wanted to have sex with Thomas. She said, "No," and that she didn't like First Nation people. When asked if she was scared or hurt, she replied, "No."

[41] Ms. Senkpiel described the complainant's voice as having a nervous edge. There was no hesitation or gaps between questions and answers. She described the words used by the complainant as her exact words, which she put on her chart that evening. She was not cross-examined on her chart notes.

[42] Constable Elaine Maisonneuve responded to a call from Macaulay Lodge received at 3:38 p.m. on November 18, 2000. She was briefed and taken to the complainant's room where she took photographs. She then proceeded to meet the complainant at 4:50 p.m. in Elaine Senkpiel's office. Her notes of the conversation were recorded in her notebook at 5:45 p.m.

[43] The complainant said to Cst. Maisonneuve that she was lying in bed with a blanket over top of her when Thomas entered her room. He took the blanket off her, took off his clothes, and she took off her own clothes. She said Thomas was soft and floppy and tried to put his dink inside her. She said she didn't want to have sex. He was

pumping up and down and moaning. She didn't think he ejaculated. She could smell alcohol on his breath. He was always nice to her but not when he was intoxicated. She rang the emergency bell but did not recall asking him to leave. Cst. Maisonneuve recalled the complainant reported saying, "You'd better fucking get off," to the accused. She was trying to sleep at the time.

[44] Constable Maisonneuve said the conversation took 15 minutes. She recalls that some of the information from the complainant was volunteered and some was from answers to her questions. Cst. Maisonneuve cannot tell which information arose from questions as opposed to being volunteered. There were some gaps of five seconds between questions and answers.

[45] Elaine Senkpiel was present for this conversation between the complainant and Cst. Maisonneuve. However, she did not take notes of the conversation and has no recall of the content of the conversation.

[46] Donna Organ and Cst. Maisonneuve took the complainant to the hospital where Dr. Ikeji examined the complainant and completed the sexual assault examination kit. Dr. Ikeji observed bruises on the complainant's inner thigh and at the entry to her vagina. She described them as fresh. Dr. Ikeji described the complainant's emotional condition as normal. I cannot place much weight upon the written report from the sexual assault kit as it appears to have information from Donna Organ rather than the complainant.

[47] The next statement was taken by Cst. Maisonneuve back at Macaulay Lodge at 9:01 p.m. on the day of the incident after the visit to Dr. Ikeji at the hospital. Donna

Organ was with the complainant in the smoking room on the main floor. She testified that Thomas Harper's mother came in and verbally attacked the complainant saying:

We were in the smoke room, or coffee room, or whatever you want to call, where you can smoke in the main floor area, [the complainant] and I. And Flora Harper came into the smoke room, and I thought she was going to come and apologize to [the complainant]. on Thomas's behalf. So that's why I let her come and talk to [the complainant], but it was quite contrary to what I was expecting, and she verbally attacked [the complainant]. She said something to the effect that, "You're a bad girl, and all you do is getting after my boy and you've gone and gotten him in trouble now, and it's all your fault." Something to that effect, just before we went in to – for [the complainant] to give the statement.

[48] Donna Organ rebuked Thomas Harper's mother saying she was not to talk to anybody like that and not to the complainant. She said it was not the complainant's fault and took Thomas Harper's mother away. Donna Organ said the complainant was shocked but Donna Organ was not certain the complainant knew where it was coming from or why or anything.

[49] The transcript of the audiotape, with some handwritten amendments agreed to be correct by Crown and defence, was filed as an exhibit. Cst. Maisonneuve took the statement and Donna Organ was also permitted to ask questions. I will not repeat the statement word for word in its entirety. It told a different story. The complainant said, "We started kissing" and later, "I said that we should have sex together."

[50] She confirmed that they had sex and as he weighs quite a bit, she said, "I told him I should actually go on top of you."

[51] After the intercourse, she said he went for her breasts. After that she couldn't remember what happened and said, "I really don't know. My M.S."

[52] Donna Organ then asked the complainant directly if she remembered what the complainant had said to her that afternoon. This is the exchange. The letter E refers to questions from Donna Organ, the letter Q refers to questions from Cst. Maisonneuve and the letter A refers to the complainant's answers.

E: Do you remember me coming to you? Do you remember what you said to me? You don't remember?

A: No. Tell me what I said.

E: What you said?

A: Yeah.

E: You said to me that "I was just fucked by a native man". That's what you said; and I asked you who and you said it was that guy Thomas. And you told me that it was something that you didn't want to do. You said that you'd hadn't wanted it, that he just came in your room and did that to you.

A: That isn't true.

E: That's not true?

A: No.

E: Because I think that's what you told the other nurse too. Do you remember? Do you remember telling us that?

A: Hm. Hm. I didn't mean that at all.

E: So what did you mean, (complainant)?

A: (NO AUDIBLE RESPONSE)

E: Do you know what you did mean?

- A: Huh?
- E: Do you know what you did mean?
- A: No.
- E: You don't know. So were you in your room by yourself sleeping, before this happened?
- A: Yeah.
- E: So he just came into you room?
- A: (NO AUDIBLE RESPONSE)
- Q: So can you tell me why (complainant) that um.. you told the nurses at first that you didn't want it to happen, and now that you're telling us that you – you wanted it to happen? Can you tell me why that's changed since then?
- A: I like that man when he isn't drinking.
- Q: Okay.
- A: He's a jerk now because he's been drinking.
- Q: Okay. That's why you told the nurses? Were you feeling angry at him, or how were you feeling toward him?
- A: I didn't feel anything at all towards him.

[53] The answers of the complainant became less responsive to further leading questions until the statement was ended at 9:14 p.m.

[54] Constable Maisonneuve described the complainant as calm but tired during the questioning. The gaps between the questions and answers were longer than in the statement of the complainant to Cst. Maisonneuve in Elaine Senkpiel's office earlier that day.

[55] The next statement of the complainant was video and audio taped. It was taken at 6:37 p.m. on November 19, 2000, at the RCMP station. A transcript, with handwritten amendments agreed to by counsel, was filed as an exhibit. The bulk of the questioning was done by Cst. Maisonneuve with some questioning by Elaine Senkpiel.

[56] The first open-ended question about what happened was answered by complainant as follows:

I was having a nap in my room, I was laying in my bed and my eyes were closed and all that stuff and all of a sudden Thomas was there like right in front of my eyes. I thought ah, fuck. I couldn't believe this was happening you know. Jesus. You know, I said, "What the hell do you want?" and he goes "I just love you". He said it to me, I said "No you don't". He goes "Yes I do". I couldn't believe he actually said that to me. I don't really like Thomas at all. You know. So any ways he started having sex with me. He took my pants off and he took his pants off, which I thought "Fuck, I ain't doing this". It's just gross.

[57] The gist of this statement is that the complainant did not want him in her room and found him quite disgusting.

[58] The accused was cooperative with the nursing staff at Macaulay Lodge after the incident. He was not arrested until December 2, 2000. Between November 18, 2000, and his arrest on December 2, 2000, Thomas Harper did not visit Macaulay Lodge daily as he had prior to the incident. On one occasion, the First Nation liaison worker advised him to call the police. He did not do so.

THE POSITION OF THE CROWN

[59] The Crown submits that the first words spoken by the complainant were powerful and unsolicited. Those words combined with the disarray of the clothing, incontinence pad, smell of alcohol both in the room and the intoxication of Thomas Harper nearby, confirm that a non-consensual sexual activity took place. The Crown says identity of Thomas Harper is made out and confirmed by the complainant in a photo lineup. The Crown admits that the complainant is capable of consenting to sexual activity but the totality of the evidence confirms that Thomas Harper entered the complainant's room before 3:00 p.m. and sexually assaulted her. The Crown submits that the contradictory statement of the complainant to Cst. Maisonneuve approximately six hours after the incident, can be explained by the verbal confrontation with the complainant by Thomas Harper's mother prior to the statement. The Crown alleges that the post offence conduct of the accused suggests consciousness of guilt on the part of Thomas Harper.

THE POSITION OF THE DEFENCE

[60] The defence submits that the Crown has failed to prove the lack of consent of the complainant beyond a reasonable doubt. The defence concedes that the identity of Thomas Harper has been established but that the evidence of the complainant is contradictory and not reliable. The defence says the complainant has memory of the incident even up to the time of trial but gives a contradictory account both at trial and following the event that raises a reasonable doubt about an essential element of the offence, her lack of consent. The defence says that Thomas Harper did not show any

guilt and co-operated with the staff after the incident. Counsel also raised the defence of honest but mistaken belief on the part of the accused.

THE LAW

[61] There are two components of the offence of sexual assault which have been restated by the Supreme Court of Canada in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330.

[62] The *actus reus* of a sexual assault is established by proving touching, the sexual nature of the contact and the absence of consent. The touching and sexual nature are objectively considered by the trier of fact from all the evidence. However, the absence of consent is subjective and determined by reference to the complainant's internal subjective state of mind. The only direct evidence comes from the complainant but it must be considered with all the evidence. (See paras 25, 26 and 29 of *Ewanchuk*, *supra*.)

[63] The second component is the *mens rea*. Sexual assault is a crime of general intent which means the Crown need only prove that the accused intended to touch the complainant. The law also recognizes the defence of honest but mistaken belief in the consent of the complainant.

[64] The focus in this case has been on the issue of whether there is a reasonable doubt about the complainant's absence of consent. When instructing juries on this legal concept, the following words are often used:

The phrase, "beyond a reasonable doubt", is a very important part of our criminal justice system.

A reasonable doubt is not a far fetched or frivolous doubt. It is not a doubt based on sympathy or prejudice. It is a doubt based on reason and common sense. It is a doubt that logically arises from the evidence, or the lack of evidence.

It is not enough for you to believe that the accused is probably or likely guilty. In those circumstances, you must find him not guilty, because Crown counsel would have failed to satisfy you of his guilt beyond a reasonable doubt. Proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

You should also remember, however, that it is nearly impossible to prove anything with absolute certainty. Crown counsel is not required to do so. Absolute certainty is a standard of proof that is impossibly high.

If, at the end of the case, based on all of the evidence, you are sure that the accused committed the offence, you should find the accused guilty of it, since you would have been satisfied of his guilt of that offence beyond a reasonable doubt.

If, at the end of the case, based on all of the evidence or the lack of evidence, you are not sure that the accused committed the offence, you should find him not guilty of it.

(Criminal Jury Instructions authored by Mr. Justice David Watt of the Superior Court of Justice of Ontario.)

DISCUSSION

[65] I have no doubt that Thomas Harper was engaged in sexual activity with the complainant on November 18, 2000, before 3:00 p.m. It is not necessary to establish the exact time that it occurred. The totality of the evidence about the state of the room and the complainant, the disarray of the clothing on the bed, the smell of the room, the intoxication of Thomas Harper and the fresh bruises on the complainant, satisfies me that sexual activity took place.

[66] I am not satisfied that it was sexual intercourse nor is it necessary to prove sexual intercourse to constitute a sexual assault.

[67] The defence has submitted that the defence of honest but mistaken belief should apply. I find that the factual basis to support such a defence is insufficient.

[68] The Crown's allegation of consciousness of guilt from the post offence conduct is also rejected for insufficient evidence.

[69] However, at the end of the day, I am left with a reasonable doubt with respect to the lack of consent. I do not make this finding lightly. I do not make this finding based solely on the contradictory evidence of the complainant at trial, which may be explained by the devastating damage that her multiple sclerosis has had on her brain.

[70] I have considered the fact that her denial of the sexual assault six hours later was made in the presence of her care worker. Donna Organ put it directly to the complainant what she had said to her shortly after 3:00 p.m. that day. The complainant flatly stated that what she had said to her care workers was not true. That denial raises a reasonable doubt in my mind.

[71] The Crown relied upon evidence that Thomas Harper's mother had verbally attacked the complainant shortly before and that this affected her statement to Cst. Maisonneuve. Although Donna Organ reported this incident, she did not testify that it had an effect on the complainant's statement. The result is that I cannot place much weight on that evidence to explain the complainant's denial that she was assaulted.

[72] Cases such as this are probably the most difficult that courts have to face. They are stressful for the complainant, her family and the staff at Macaulay Lodge. The criminal law is of necessity an after the fact process and confronts the frailty of the human memory and our ability to determine what really happened in any given case. There is no doubt that the vulnerable members of our society have a diminished ability to make their case even when their hearsay evidence is admitted.

[73] However, the purpose of requiring proof beyond a reasonable doubt is to avoid innocent people being convicted. In cases where a judge or jury is not certain that an accused is guilty, a not guilty verdict must be given.

[74] I find Thomas Harper not guilty of the charge of sexual assault.

Veale J.

Narissa Somji For the Crown

Gordon Coffin and
Fia Jampolsky For the Defence