Citation: R. v. Stewart
2001 YKCA 0010

Date: 20011018
Docket: YU00378
Registry: Vancouver

COURT OF APPEAL FOR YUKON TERRITORY

ORAL REASONS FOR JUDGMENT

Before:

The Honourable Mr. Justice Braidwood
The Honourable Madam Justice Saunders
The Honourable Madam Justice Proudfoot

October 18, 2001

Vancouver, B.C.

BETWEEN:

REGINA

RESPONDENT

AND:

GEORGE PAUL STEWART

APPELLANT

D. Turko — appearing for the Appellant

P. Chisholm — appearing for the (Crown) Respondent

[1] **BRAIDWOOD, J.A.**: The appellant and the complainant were married in December 1995. They continued to live together as a married couple until 12 July 1996. At trial, the appellant was convicted for physically assaulting and threatening his wife between March and July 1995. He now appeals against his conviction for three counts of sexual assault, pronounced 25 September 1996.

[2] Paragraph 3 of the appellant's factum reads as follows:

> This appeal concerns the failure of the appellant's trial counsel to provide reasonable and effective legal assistance, and whether such representation denied the appellant the right to a fair trial.

This appeal concerns the failure of the appellant's trial counsel to provide reasonable and effective legal assistance, and whether such representation denied the appellant the right to a fair trial.

[3] The appellant's trial counsel in this case failed to make an application pursuant to s. 276 (2) of the ***Criminal Code,*** R.S.C. 1985, c. C-46 to permit the admission of evidence pertaining to the complainant's prior sexual history. On three occasions during the trial, the appellant's trial counsel attempted to elicit information about the couple's sexual history; however, the court forbade such questions.

[4] There were two groups of charges in this case. The first group of charges related to non-sexual assault and the second group of charges related to sexual assault. By way of background I will refer to a few paragraphs of the learned trial judge's Reasons as they relate to the first group (the non-sexual assault charges). Paragraphs 3, 4, 7, and 9 of his Reasons read as follows:

> [3] Mrs. S. alleges that in February she and the accused were preparing to go on a snowmobile trip. The accused became enraged and began breaking things and throwing articles around the house. During the course of this outburst, he threw an axe at her. The axe missed. He then threw a file, which struck the wall, and then her back, cutting her shirt and back. He then kicked her in the hand, causing a re-fracture of a break that had been suffered some months earlier.
>
> [4] The accused then grabbed a rifle and pointed it at Mrs. S.'s head, asking her if she wanted to "see what the real G.S. was like." He then stopped and told her to clear up the mess.
>
> . . .
>
> [7] Mrs. S. further testified that in March, there was an argument in the basement of their home because the accused was smoking marihuana in the house and she wanted him to stop doing so. She said that she was pushed to the floor and kicked in the back and buttocks five or six times, with the accused saying as he did, "Consider this a divorce, bitch."
>
> . . .

> [9] At around the same time, that is the first week of July, Mrs. S. testified that the accused and she had watched a video during which a man was beaten to death by an assailant armed with a piece of two-by-four lumber with nails protruding from the end. On several occasions, the accused told Mrs. S. that he would do the same thing to her. She did not think he was joking and was frightened by the remarks.

[5] The second group of charges, as I have said, relates to matters of sexual assault. Here, again, I will read from the trial judge's Reasons, now at para. 12:

> [12] On July 10th Mrs. S. was again sleeping. The accused came in and attempted again to have anal intercourse with her. She awoke and asked him what he was doing. He slapped her really hard. Then she said she "just let him do it." She testified that he would have had sex with her whether she wanted to or not, that he would physically restrain her if necessary. She could not remember if the penetration was vaginal or anal. She said that she felt hopeless and used.

There were other such incidents as the one outlined above, which I need not particularize.

[6] The argument before us related to the fact that, had counsel properly given the notice and consequently been allowed to cross-examine on prior sexual conduct, this would have assisted the trier of fact concerning issues of credibility and could perhaps have raised a reasonable doubt as to the appellant's guilt.

[7] However, the difficulty with this submission is that the underlying problem for the appellant in this case is **not** so much that there may have been what I will call abusive, or rough, sex (abusive in the eyes of the complainant, rough in the eyes of the appellant). Instead, however one categorizes any sex that may have occurred between the parties, the basic aspect of this case is that the complainant simply did not consent to the sexual intercourse at issue. That being so, whether or not events occurred relating to rough sex on previous occasions is irrelevant. One cannot infer from a history of rough or abusive sex that the complainant consented to the sexual acts as alleged, be they rough or otherwise.

[8] Accordingly, I am of the opinion that, even had leave been granted to cross examine the complainant, it would have made no difference whatsoever to the outcome for it would not have been relevant to any issue before the Court.

Accordingly, I would not allow this appeal.

SAUNDERS, J.A.: I agree.

PROUDFOOT, J.A.: I agree.

"The Honourable Mr. Justice Braidwood"

CORRECTION: The citation should be R. v. Stewart, 2001BCCA YU0010; COURT OF APPEAL FOR BRITISH COLUMBIA should be COURT OF APPEAL FOR YUKON TERRITORY.