COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***R. v. Kereliuk,***
2007 YKCA 3

Date: 20070529
Docket: CA05-YU540

Between:

Regina

Appellant

And

William Steve Kereliuk

Respondent

ORAL REASONS FOR JUDGMENT

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Low

D. McWhinnie — Counsel for the Appellant

K. Parkkari — Counsel for the Respondent

Place and Date of Judgment: Whitehorse, Yukon
May 29, 2007

Oral Reasons by:
The Honourable Madam Justice Huddart

Concurred in by:
The Honourable Chief Justice Finch
The Honourable Mr. Justice Low

Reasons for Judgment of the Honourable Madam Justice Huddart:

[1] HUDDART J.A. (Oral): This Crown appeal raises two questions of law: whether the trial judge erred in acquitting the respondent on two counts (breaking and entering and committing sexual assault and sexual assault) on the basis that she had a reasonable doubt that his admitted voluntary touching of the complainant's leg was "for a sexual purpose" and, alternatively, in failing to hold on the facts she found that the included offence of assault had been proven, such that he should be found guilty of breaking and entering and committing assault or assault *simpliciter*.

[2] The incident took place in a room at the Continental Divide Hotel near Teslin about 1:30 a.m. on 10 September 2004. The trial judge summarized the complainant's testimony at para. 3 of her reasons for judgment: ***R.* v. *Kereliuk***, 2005 YKTC 42:

> Ms. [S.] gave evidence in which she indicated that in the early morning hours of September 10th, Mr. Kereliuk came into her room while she was sleeping. She awoke when her dog barked to find him in the room. She turned on the light. He sat on her bed, touched her on the leg and made a comment to the effect of "Is this what I have to do to get lucky?" He also made comments to her with respect to his bed and also with respect to inviting her to his room for a beer. It is also clear, on her version, that he made several attempts to get her dog to come to him. Sometime later, it appears that he got up to leave the room, at which point he stumbled, went to the wrong door, that being the bathroom door as opposed to the outer door of the room, and subsequently left.

[3] The complainant had also testified that she saw the respondent (who was staying in the room next door) squeeze into her room, that he walked directly to the bed and sat down; that he left only after she heard the voice of a friend outside the

window, when she repeated that she was “serious” that he had to leave. She was in her pyjamas, with her covers to her chest. He sat “just about where her feet were.”

[4] The trial judge said that “overall I would be inclined to believe [the complainant’s] version, and I would be inclined to believe that the touching was for a sexual purpose.” Then she continued:

> However, the test that I must apply is not what I am inclined to believe or what is most likely true, but rather what has been proven beyond a reasonable doubt. It is a very high and exacting standard that I must apply.

[5] The trial judge rejected the respondent’s story of what happened early that morning, but found in his testimony, in part corroborated by the complainant’s testimony, the possibility that the respondent’s intention in entering her room, sitting on the bed and stroking her leg, was to spend time with her dog. The trial judge then explained, at para. 14-15 of her oral reasons for judgment:

> Given his intoxicated state and his clear lack of insight into the reactions of others, I must say that it is possible that he believed that he was joking when he made the comment about getting lucky and that he believed that she understood him to be joking as opposed to his making the comment for a sexual purpose.
>
> In all of the circumstances, even though as I say, I find her version more likely to be true, I must say that I am left with a reasonable doubt as to whether or not the touching was for a sexual purpose, and in such circumstances I have no option but to acquit.

[6] On a plain reading of the trial judge’s reasons, she erred in her consideration and application of ***R.* v. *Chase***, [1987] 2 S.C.R. 293. The test is purely objective; the offence is one of general intent, as McIntyre J. wrote at 102-4 in that case:

> … Sexual assault is an assault within any one of the definitions of that concept in s. 244(1) of the *Criminal Code* which is committed in circumstances of a sexual nature, such that the sexual integrity of the

> victim is violated. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: "Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer" [citing *R. v. Taylor* (1985), 44 C.R. (3d) 263 (Alta C.A.)]….

[7] At para. 9 of her reasons, the trial judge introduced the next portion of Mr. Justice McIntyre's reasons (where he set down circumstances potentially relevant to that determination) this way:

> The Supreme Court of Canada has indicated that in determining whether a touching is <u>for a sexual purpose</u>, it must be "Viewed in light of all of the circumstances."

[8] The respondent would have this Court find the trial judge misspoke when she used the quote "for a sexual purpose," that she was considering whether the respondent touched the complainant in circumstances of a sexual nature. I do not agree. When I read her reasons as a whole, and particularly the portions I quoted earlier, I find her use of the phrase "for a sexual purpose" to be deliberate on each of the five occasions she used it in her reasons. In effect, she treated the offence charged as one of specific intent by finding in a reasonable doubt about the respondent's intention, reason to acquit.

[9] In considering the respondent's "purpose" or intent, and his "intoxicated state," it is apparent the trial judge effectively applied a subjective test to the respondent's conduct, rather than the objective test mandated by the law.

[10] This error is sufficient to require a new trial. The result of such a trial would not necessarily be the same. I would not accede to the appellant's request that a

conviction for breaking and entering and committing sexual assault be entered because the respondent is entitled to a trial where the law is properly applied.

[11] There is no need to consider the second alleged error, because the included offences will undoubtedly be considered at the new trial.

[12] It follows I would allow the appeal and direct a new trial.

[13] FINCH C.J.Y.T.: I agree.

[14] LOW J.A.: I agree.

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The Honourable Madam Justice Huddart