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Criminal

Trial judge's 'stereotypical inferences' spur new trial in sex assault case

By **John Schofield**

(March 12, 2021, 9:33 AM EST) -- In what one lawyer describes as an important decision for sexual assault cases, the Ontario Court of Appeal has ordered a new trial after finding a lower court judge improperly relied on stereotype to reject the accused's motive theory and his evidence about securing the complainant's consent.

"I need not resolve whether the trial judge interpreted JC's testimony fairly," Court of Appeal Justice David M. Paciocco wrote in a March 3 decision in *R. v. J.C.* 2021 ONCA 131.

"Whether he did so or not, the trial judge's reasoning, in rejecting JC's testimony on obtaining consent, contravenes both the rule against ungrounded common-sense assumptions, and the rule against stereotypical inferences."

The unanimous, 44-page decision was concurred in by supernumerary Justice Russell G. Juriansz and Justice Michael Tulloch.

The appellant, JC, and the complainant, HD, became friends after meeting in 2014, when he was 28 and she was 19. The friendship involved occasional casual sex until the fall of 2014, when HD began a relationship with another man.

According to facts detailed in the decision, JC continued to pursue HD persistently in text messages. HD, who admitted to memory problems due to mental health issues, alcohol use and drug addictions, testified that she contacted JC in late 2014 hoping he could help her find work in the entertainment industry.

The charges stemmed from a Jan. 22, 2015, encounter, when HD went to JC's apartment. At one point, he took a short video of her masturbating that showed him at times touching her intimately with his hand. The Crown argued that HD was intoxicated into incapacity when this event occurred. HD testified that she awoke after blacking out, JC played her the video and then threatened to put it on the Internet if she did not continue to have sex with him. She testified that she had non-consensual sex with him six to eight times in his apartment after that.

In late July 2015, she filed a complaint with the police, about three weeks after telling her boyfriend about the situation. In the 2018 trial, HD and JC were the only witnesses to testify. JC testified that he had genuine and sincere feelings for HD, even though he was not interested in a monogamous relationship. He testified that, on the evening in question, there was no indication that HD was intoxicated and that their sexual encounter was consensual and she agreed to be filmed. He said their subsequent sexual encounters were also consensual and he denied that he ever used the video to extort HD into having sex with him.

In his extensive written reasons, Superior Court Justice Michael G. Quigley acquitted JC of sexual assault and voyeurism charges stemming from the sexually explicit video, saying he was left with a reasonable doubt about HD's incapacity. However, he found JC guilty of sexual assault and extortion based on the sexual encounters after the video was made, accepting HD's testimony that the sex was extorted and non-consensual. The extortion charge was stayed pursuant to *R. v. Kienapple* [1975] 1 S.C.R. 729.

The trial judge said that JC's testimony about expressly seeking HD's consent before engaging in specific sexual acts with her was "too perfect, too mechanical, too rehearsed, and too politically

correct to be believed." He also rejected JC's claim that HD had a motive to mislead, concocting the allegations against JC to conceal her "cheating" with JC from her boyfriend.

But the Court of Appeal concluded that the trial judge fell prey to multiple stereotypes.

For example, "the trial judge's reasoning that the motive theory was not viable without evidence that HD's boyfriend confronted JC rests itself upon the stereotype of the aggressive, jealous boyfriend," wrote Justice Paciocco.

The trial judge also erred by lending too much credence to HD because of her willingness undergo a criminal proceeding. "It is dangerous for a trial judge to find relevance in the fact that a complainant has exposed herself to the unpleasant rigours of a criminal trial," ruled the Court of Appeal.

"The primary concern with using a complainant's readiness to advance a criminal prosecution," the Appeal Court added, "is that doing so cannot be reconciled with the presumption of innocence."

Chris Rudnicki, Rusonik, O'Connor, Robbins, Ross & Angelini LLP

Chris Rudnicki, a partner with Toronto-based Rusonik, O'Connor, Robbins, Ross & Angelini LLP who served as counsel for the appellant, said the "important" decision offers a strong caution to lower courts against ungrounded common sense reasoning and stereotypical thinking.

"The #MeToo movement has been a really powerful movement and a very welcome and important movement in drawing attention to abusive relationships that have existed and permitting women to tell their stories without fear of shame or stigma," he told *The Lawyer's Daily*.

"But sometimes you have Crown attorneys suggesting that any attack on the complainant's credibility is an attack that's grounded in stereotype or myth," he added. "And that's clearly not the case. Accused persons are entitled to defend themselves. They're entitled to attack a complainant's credibility or reliability to raise a doubt about the Crown's ability to prove beyond a reasonable doubt that they've committed the offence charged. I think that's what's at play here."

Lisa Dufraimont, an associate professor at Osgoode Hall Law School at York University who was cited in the decision for a 2019 article she wrote, said the ruling significantly advances the law on myths and stereotypes in sexual assault.

Lisa Dufraimont, associate professor at Osgoode Hall Law School

"Canada has substantial jurisprudence on the question of myths and stereotypes in sexual assault when they make reasoning illegitimate, and this is a case that really tries to take that on to break down what kinds of errors can occur," she told *The Lawyer's Daily*. "Justice Paciocco lays out what he says are two related overlapping rules in this area, and so I think that that's a very new way of looking at this.

"What this case tells us is that it is an error for a judge to rely on stereotypes, of course," she added. "But it is also an error to reject and dismiss defence arguments out of hand, when in fact they're not based on stereotypes."

It's essential for lawyers and the judges to have a strong understanding of what types of reasoning are impermissible stereotypes and what types of reasoning are legitimate, said Dufraimont.

"Reasoning based on stereotypes is not acceptable," she noted. "But there are sometimes legitimate inferences that have some resemblance to stereotypes — and this is where judges and lawyers can get into trouble."

Brian Gray, a spokesperson for the Ministry of the Attorney General, said it would be inappropriate to comment on the decision from the Crown's perspective because the matter is still before the courts.

If you have any information, story ideas or news tips for The Lawyer's Daily *please contact John Schofield at* john.schofield@lexisnexis.ca *or call 905-415-5891.*

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