Supreme Court Judgments

R. v. Ewanchuk

Collection:	Supreme Court Judgments
Date:	1999-02-25
Report:	[1999] 1 SCR 330
Case number:	26493
Judges:	Lamer, Antonio; L'Heureux-Dubé, Claire; Gonthier, Charles Doherty; Cory, Peter deCarteret; McLachlin, Beverley; Iacobucci, Frank; Major, John C.; Bastarache, Michel; Binnie, William Ian Corneil
On appeal from:	Alberta
Subjects:	Criminal law
Notes:	SCC Case Information: 26493

R. *v.* Ewanchuk, [1999] 1 S.C.R. 330

Her Majesty The Queen *Appellant*

v.

Steve Brian Ewanchuk *Respondent*

and

The Attorney General of Canada,
Women's Legal Education and Action Fund ("LEAF"),
Disabled Women's Network Canada ("DAWN Canada")
and Sexual Assault Centre of Edmonton *Interveners*

Indexed as: R. *v.* Ewanchuk

File No.: 26493.

1998: October 14; 1999: February 25.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

on appeal from the court of appeal for alberta

Criminal law -- Sexual assault -- Consent -- Nature of consent -- Accused persistently engaging complainant in a series of progressively more intimate sexual advances -- Complainant clearly saying no to each advance -- Complainant fearful and accused aware of her fear -- Whether a sexual assault occurred -- Whether defence of "implied consent" exists in Canadian law -- Whether trial judge erred in applying that defence -- Criminal Code, R.S.C., 1985, c. C-46, ss. 265(1), (2), (3), 273.1, 273.2, 686(4).

The complainant, a 17-year-old woman, was interviewed by the accused for a job in his van. She left the van door open as she was hesitant about discussing the job offer in his vehicle. The interview was conducted in a polite, business-like fashion. After the interview, the accused invited the complainant to see some of his work which was in the trailer behind the van. The complainant purposely left the trailer door open but the accused closed it in a way which made the complainant think that he had locked it. There was no evidence whether the door was actually locked. The complainant stated that she became frightened at this point. The accused initiated a number of incidents involving touching, each progressively more intimate than the previous, notwithstanding the fact that the complainant plainly said "no" on each occasion. He stopped his advances on each occasion when she said "no" but persisted shortly after with an even more serious advance. Any compliance by the complainant was done out of fear and the conversation that occurred between them clearly indicated that the accused knew that the complainant was afraid and certainly not a

willing participant. The trial judge acquitted the accused of sexual assault relying on the defence of implied consent and the Court of Appeal upheld that acquittal. At issue here are whether the trial judge erred in his understanding of consent in sexual assault and whether his conclusion that the defence of "implied consent" exists in Canadian law was correct.

Held: The appeal should be allowed.

Per Lamer C.J. and Cory, Iacobucci, Major, Bastarache and Binnie JJ.: If the trial judge misdirected himself as to the legal meaning or definition of consent, then his conclusion is one of law, and is reviewable. It properly falls to this Court to determine whether the trial judge erred in his understanding of consent in sexual assault, and to determine whether his conclusion that the defence of "implied consent" exists in Canadian law was correct.

A conviction for sexual assault requires proof beyond reasonable doubt of two basic elements, that the accused committed the *actus reus* and that he had the necessary *mens rea.* The *actus reus* of assault is unwanted sexual touching. The *mens rea* is the intention to touch, knowing of, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched.

The *actus reus* of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent. The first two of these elements are objective. It is sufficient for the Crown to prove that the accused's actions were voluntary. The Crown need not prove that the accused had any *mens rea* with respect to the sexual nature of his behaviour. The absence of consent, however, is purely subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred. While the complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trier of fact in light of all the evidence. It is open to the accused to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place. If, however, the trial judge believes the complainant that she did not consent,

the Crown has discharged its obligation to prove the absence of consent. The accused's perception of the complainant's state of mind is not relevant and only becomes so when a defence of honest but mistaken belief in consent is raised in the *mens rea* stage of the inquiry.

The trier of fact may only come to one of two conclusions: the complainant either consented or did not. There is no third option. If the trier of fact accepts the complainant's testimony that she did not consent, no matter how strongly her conduct may contradict that claim, the absence of consent is established and the third component of the *actus reus* of sexual assault is proven. No defence of implied consent to sexual assault exists in Canadian law. Here, the trial judge accepted the complainant's testimony that she did not want the accused to touch her, but then treated her conduct as raising a reasonable doubt about consent, described by him as "implied consent". This conclusion was an error.

To be legally effective, consent must be freely given. Therefore, even if the complainant consented, or her conduct raises a reasonable doubt about her non-consent, circumstances may arise which call into question what factors prompted her apparent consent. Section 265(3) of the *Criminal Code* enumerates a series of conditions -- including submission by reason of force, fear, threats, fraud or the exercise of authority -- under which the law will deem an absence of consent in assault cases, notwithstanding the complainant's ostensible consent or participation. In a situation where the trier of fact finds that the complainant did not want to be touched sexually and made her decision to permit or participate in the sexual assault activity as a result of an honestly held fear, the law deems an absence of consent and the third component of the *actus reus* of sexual assault is established. The complainant's fear need not be reasonable, nor must it be communicated to the accused in order for consent to be vitiated. While the plausibility of the alleged fear, and any overt expressions of it, are obviously relevant to assessing the credibility of the complainant's claim that she consented out of fear, the approach is subjective. If, as in this case, the complainant's testimony establishes the absence of consent beyond a reasonable doubt, the *actus reus* analysis is complete, and the trial judge should have turned his attention to the accused's perception of the encounter and the question of whether the accused possessed the requisite *mens rea*.