R. *v.* Chase, [1987] 2 S.C.R. 293

Her Majesty The Queen *Appellant*

v.

Dalton Chase *Respondent*

INDEXED AS: R. *v.* CHASE

File No.: 18846.

1986: April 25; 1987: October 15.

Present: Dickson C.J. and Beetz, McIntyre, Chouinard*, Lamer, Wilson and Le Dain JJ.

*Chouinard J. took no part in the judgment.

on appeal from the court of appeal for new brunswick

Criminal law -- Sexual assault -- Definition of the offence of sexual assault -- Offence one of general rather than specific intent -- Criminal Code, R.S.C. 1970, c. C-34, ss. 244, 246.1.

Respondent was convicted of sexual assault contrary to s. 246.1(1)(*a*) of the *Criminal Code*. He entered the home of the complainant, a fifteen-year-old girl, without invitation, seized her around the shoulders and arms and grabbed her breasts. When she fought back, he said: "Come on dear, don't hit me, I know you want it." She

testified at trial that he tried to grab her "private" but did not succeed. On appeal, the Court of Appeal expressed the view that the modifier "sexual" in the new offence of sexual assault should be taken to refer to parts of the body, particularly the genitalia. Because there was no contact with the complainant's genitals, the conviction at trial was set aside and a conviction for common assault substituted. The only question arising in this appeal is that of the definition of the offence of sexual assault.

Held: The appeal should be allowed.

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". The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant. The accused's intent or purpose as well as his motive, if such motive is sexual gratification, may also be factors in considering whether the conduct is sexual. Implicit in this view of sexual assault is the notion that the offence is one requiring a general intent only. In the present case, there was ample evidence before the trial judge upon which he could find that sexual assault was committed. Viewed objectively in the light of all the circumstances, it is clear that the conduct of the respondent in grabbing the complainant's breasts constituted an assault of a sexual nature.

Cases Cited

Considered: *R. v. Alderton* (1985), 49 O.R. (2d) 257; *R. v. Taylor* (1985), 44 C.R. (3d) 263; **referred to**: *R. v. Cook* (1985), 20 C.C.C. (3d) 18; *Leary v. The Queen*, [1978] 1 S.C.R. 29; *Swietlinski v. The Queen*, [1980] 2 S.C.R. 956; *R. v. Bernard* (1985), 18 C.C.C. (3d) 574.

Statutes and Regulations Cited

Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof, S.C. 1980-81-82-83, c. 125.

Criminal Code, R.S.C. 1970, c. C-34, ss. 244 s <(rep. & subs. 1974-75-76, c. 93, s. 21; rep. & subs. 1980-81-82-83, c. 125, s. 19], 245(1) [rep. & subs. 1972, c. 13, s. 21; rep. & subs. 1980-81-82-83, c. 125, s. 19], 246.1 [ad. 1980-81-82-83, c. 125, s. 19].

Authors Cited

Boyle, Christine. *Sexual Assault*. Toronto: Carswells, 1984.

Usprich, S. J. "A New Crime in Old Battles: Definitional Problems with Sexual Assault" (1987), 29 *Crim. L.Q.* 200.

APPEAL from a judgment of the New Brunswick Court of Appeal (1984), 13 C.C.C. (3d) 187, 40 C.R. (3d) 282, 55 N.B.R. (2d) 97, 144 A.P.R. 97, dismissing the accused's appeal from his conviction on a charge of sexual assault and substituting a verdict of guilty of common assault. Appeal allowed.

William J. Corby, for the appellant.

John S. MacPhee, for the respondent.

The judgment of the Court was delivered by

1. MCINTYRE J.--This appeal concerns the meaning of the term `sexual assault', as it is used in ss. 244 and 246.1 of the *Criminal Code*. For ease of reference, the sections are reproduced hereunder:

> **244**. (1) A person commits an assault when
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> (*a*) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> (*b*) he attempts or threatens, by an act or gesture, to apply force to another person, if he has, or causes that other person to believe upon reasonable grounds that he has, present ability to effect his purpose; or
>
> (*c*) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.
>
> (2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.
>
> (3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
>
> (*a*) the application of force to the complainant or to a person other than the complainant;

(*b*) threats or fear of the application of force to the complainant or to a person other than the complainant;

(*c*) fraud; or

(*d*) the exercise of authority.

(4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

246.1 (1) Every one who commits a sexual assault is guilty of

(*a*) an indictable offence and is liable to imprisonment for ten years; or

(*b*) an offence punishable on summary conviction.

(2) Where an accused is charged with an offence under subsection (1) or section 246.2 or 246.3 in respect of a person under the age of fourteen years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge unless the accused is less than three years older than the complainant.

2. The facts may be briefly described. The respondent, Chase, was a neighbour of the complainant, a fifteen-year-old girl. They lived in a small hamlet near Fredericton, New Brunswick. On October 22, 1983, Chase entered the home of the complainant without invitation. The complainant and her eleven-year-old brother were in the downstairs portion of the house, playing pool. Their eighty-three-year-old

grandfather was upstairs sleeping. Their parents were absent. The respondent seized the complainant around the shoulders and arms and grabbed her breasts. When she fought back, he said: "Come on dear, don't hit me, I know you want it." The complainant said at trial that: "He tried to grab for my private, but he didn't succeed because my hands were too fast." Eventually, the complainant and her brother were able to make a telephone call to a neighbour and the respondent left. Prior to leaving, he said that he was going to tell everybody that she had raped him. The whole episode lasted little more than half an hour. The respondent was charged with the offence of sexual assault and was found guilty after trial in the Provincial Court. He appealed to the Court of Appeal for New Brunswick where his appeal was dismissed, a verdict of guilty of the included offence of common assault under s. 245(1) of the *Criminal Code* was substituted, and a sentence of six months' imprisonment was imposed: (1984), 13 C.C.C. (3d) 187, 40 C.R. (3d) 282, 55 N.B.R. (2d) 97, 144 A.P.R. 97.

3. In the Court of Appeal, Angers J.A., speaking for a unanimous court (Stratton C.J.N.B., Ryan and Angers JJ.A.), expressed the view that the principles developed with respect to rape and indecent assault were of little assistance in approaching the question of sexual assault. In his view, the modifier "sexual" should be taken to refer to parts of the body, particularly the genitalia. He considered that a broader definition of the term could lead to absurd results if it encompassed other portions of the human anatomy described as having "secondary sexual characteristics". He also expressed the view that sexual assault did not require or involve a specific intent. Because there was no contact with the complainant's genitals, the conviction at trial was set aside and a conviction for common assault substituted. It becomes evident from the recital of these facts that the only question arising on the appeal is that of the definition of the offence of sexual assault.

4. The new sexual assault provisions of the *Criminal Code* were enacted in the *Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c. 125. They replace the previous offences of rape, attempted rape, sexual intercourse with the feeble-minded, and indecent assault on a female or male. It is now for the courts to endeavour to develop a realistic and workable approach to the construction of the new sections. The key sections are 244 and 246.1, *supra*. Section 246.1 creates the offence of sexual assault, an expression nowhere defined in the *Criminal Code*. To determine its nature, we must first turn to the assault section, 244(1), where an assault is defined in terms similar, if not identical, to the concept of assault at common law. Section 244(2) provides that the section applies to sexual assaults. It was suggested in argument by the respondent that paras. (*a*), (*b*) and (*c*) of s. 244(1) are to be read disjunctively so that only para. (*a*) could be applicable to the offence of sexual assault. This, it was said, must have been the position taken by the New Brunswick Court of Appeal because, in its consideration of s. 244, it dealt only with para. (*a*), apparently considering that contact was necessary to complete a sexual assault. I would dispose of this argument by simply referring to the specific words of s. 244(2) which make the section applicable to sexual assaults. In my view, however sexual assault may be defined, its definition cannot be limited to the provisions of s. 244(1)(*a*).

5. Since judgment was given in this case in the New Brunswick Court of Appeal, other appellate courts have dealt with the problem. As far as I am able to determine, none has followed the approach of the Court of Appeal in this case. In *R. v. Alderton* (1985), 49 O.R. (2d) 257, the matter was presented to the Ontario Court of Appeal. In that case, the accused gained entry to an apartment building at night,

wearing a face mask. He entered the apartment of the complainant who was alone and asleep in her bedroom. He seized her and forced her back upon the pillows but after a struggle she managed to escape. The Court of Appeal dismissed an appeal from a conviction of sexual assault made at trial. Martin J.A., speaking for a unanimous court (Martin, Lacourcière and Finlayson JJ.A.), said at p. 263:

> We are, with the greatest deference, unable to accept the views of the court expressed in that case [*Chase*]. Without in any way attempting to give a comprehensive definition of a "sexual assault" we are all satisfied that it *includes* an assault with the intention of having sexual intercourse with the victim without her consent, or an assault made upon a victim for the purpose of sexual gratification.
>
> We are all of the view that in the circumstances of the present case, there was ample evidence upon which the jury could find that the appellant committed a sexual assault upon the complainant and, indeed, we think the evidence did not permit of any other conclusion.

As he said, in these words, Martin J.A. was not attempting a comprehensive definition of sexual assault, nor was he saying that the concept of sexual assault was limited to an assault with the intention of having sexual intercourse or for the purposes of sexual gratification. His view was that, where these elements were present, it would be sufficient to categorize the assault as sexual. They do not constitute the sole basis for a finding of sexual assault, nor may this reference to them be taken as a finding that a specific intent is required for the completion of the offence.

6. In *R. v. Taylor* (1985), 44 C.R. (3d) 263, the matter was considered in the Alberta Court of Appeal. The accused, in seeking to discipline a teenage girl placed in his care, tied the girl's wrists to an overhead metal support and made her stand naked for periods of ten to fifteen minutes and, on one occasion, administered several

blows with a wooden paddle on the buttocks. There were no other acts which could have been described as sexual in nature. The accused was acquitted at trial. The Crown's appeal was allowed and a new trial was ordered. Laycraft C.J.A., for a unanimous court (Laycraft C.J.A., Haddad and Belzil JJ.A.), said, at p. 268:

> The new provisions do not define "sexual assault". However, "assault" is defined and thus the new offences are an assault with some additional meaning required by the modifier "sexual". In the offences which were replaced this was also true of "indecent assault", a term which gave no difficulty in judicial interpretation. For decades, juries were charged that indecent assault was an assault in circumstances of indecency (*R. v. Louie Chong* (1914), 32 O.L.R. 66, 23 C.C.C. 250 (C.A.); *R. v. Quinton*, [1947] S.C.R. 234, 3 C.R. 6, 88 C.C.C. 231). Though this approach was susceptible to the comment that it was simply an assertion that an assault is indecent if it is indecent, it was nevertheless an approach perfectly understandable by generations of juries, and eminently practicable in the administration of the criminal law.

He then went on to discuss various authorities and rejected the *Chase* approach with its reliance on the specific involvement of areas of the body and the dictionary definitions of the term "sexual". He noted that all the decisions he discussed rejected the *Chase* approach and he spoke approvingly of the position of Martin J.A. in the Ontario Court of Appeal in *Alderton, supra*, saying, at p. 269:

> Without joining a battle of dictionaries, it is my view that these words were intended to comprehend a wide range of forcible acts within the definition of "assault" to which, in the circumstances disclosed by the evidence, there is a carnal aspect. "Sexual assault" is therefore an act of force in circumstances of sexuality as that can be seen in the circumstances. Like Martin J.A. I would not attempt a comprehensive definition of "sexual assault". The term includes, however, an act which is intended to degrade or demean another person for sexual gratification. Nothing in the new sections of the Code in my view restricts the carnal or sexual aspect only to acts of force involving the sexual organs and I respectfully disagree with the restricted meaning expressed in *R. v. Chase, supra*.

It was his view that the carnal aspect was to be judged objectively: "Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer?"

7. In the British Columbia Court of Appeal, the matter was considered in *R. v. Cook* (1985), 20 C.C.C. (3d) 18. In this case, on facts which clearly revealed conduct which would qualify as sexual assaults, the *Chase* approach was again rejected. Lambert J.A. did not attempt to give a precise definition of sexual assault where Parliament had declined to do so, but he did consider that the characteristic which made a simple assault into a sexual assault was not solely a matter of anatomy. He considered that a real affront to sexual integrity and sexual dignity may be sufficient.

8. It will be seen from this brief review of the cases that the approach taken by the New Brunswick Court of Appeal in the case at bar has found little, if any, support. All the cases cited have recognized the need for a broader approach and all have recognized the difficulty in formulating one. While I would agree that it is difficult and probably unwise to attempt to develop a precise and all-inclusive definition of the new offence of sexual assault at this stage in its development, it seems to me to be necessary to attempt to settle upon certain considerations which may be of assistance to the courts in developing on a case-to-case basis a workable definition of the offence.

9. To begin with, I agree, as I have indicated, that the test for the recognition of sexual assault does not depend solely on contact with specific areas of the human anatomy. I am also of the view that sexual assault need not involve an attack by a

member of one sex upon a member of the other; it could be perpetrated upon one of the same sex. I agree as well with those who say that the new offence is truly new and does not merely duplicate the offences it replaces. Accordingly, the definition of the term "sexual assault" and the reach of the offence it describes is not necessarily limited to the scope of its predecessors. I would consider as well that the test for its recognition should be objective.

10. While it is clear that the concept of a sexual assault differs from that of the former indecent assault, it is nevertheless equally clear that the terms overlap in many respects and sexual assault in many cases will involve the same sort of conduct that formerly would have justified a conviction for an indecent assault. The definitional approach to indecent assault, also an offence not defined in the *Criminal Code*, therefore offers a guide in our approach to the new offence, as recognized by Laycraft C.J.A. After many years of dealing with the concept of indecent assault, the courts developed the definition, "an assault in circumstances of indecency". This, of course, was an imprecise definition but everyone knew what an indecent assault was. The law in that respect was reasonably clear and there was little difficulty with its enforcement. In my view then, a similar approach may be adopted in formulating a definition of sexual assault.

11. Applying these principles and the authorities cited, I would make the following observations. 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" (*Taylor*, *supra*, *per* Laycraft C.J.A., at p. 269). The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant (see S. J. Usprich, "A New Crime in Old Battles: Definitional Problems with Sexual Assault" (1987), 29 *Crim. L.Q.* 200, at p. 204.) The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence, it may be a factor in determining whether the conduct is sexual. It must be emphasized, however, that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances.

12. Implicit in this view of sexual assault is the notion that the offence is one requiring a general intent only. This is consistent with the approach adopted by this Court in cases such as *Leary v. The Queen*, [1978] l S.C.R. 29, and *Swietlinski v. The Queen*, [1980] 2 S.C.R. 956, where it was held that rape and indecent assault were offences of general intent. I am unable to see any reason why the same approach should not be taken with respect to sexual assault. The factors which could motivate sexual assault are said to be many and varied (see C. Boyle, *Sexual Assault* (1984), at p. 74). To put upon the Crown the burden of proving a specific intent would go a long way toward defeating the obvious purpose of the enactment. Moreover, there are strong reasons in social policy which would support this view. To import an added element of specific intent in such offences, would be to hamper unreasonably the enforcement process. It would open the question of the defence of drunkenness, one

which has always been related to the capacity to form a specific intent and which has generally been excluded by law and policy from offences requiring only the minimal intent to apply force (see *R. v. Bernard* (1985), 18 C.C.C. (3d) 574 (Ont. C.A., *per* Dubin J.A.)) For these reasons, I would say that the offence will be one of general rather than specific intent.

13. Turning to the case at bar I have no difficulty in concluding, on the basis of the principles I have discussed above, that there was ample evidence before the trial judge upon which he could find that sexual assault was committed. Viewed objectively in the light of all the circumstances, it is clear that the conduct of the respondent in grabbing the complainant's breasts constituted an assault of a sexual nature. I would therefore allow the appeal, set aside the conviction of common assault recorded by the Court of Appeal and restore the conviction of sexual assault made at trial. The sentence of six months should stand.

Appeal allowed.

Solicitor for the appellant: William J. Corby, Fredericton.

Solicitor for the respondent: John S. MacPhee, Fredericton.