Regina v. Cadden

48 C.C.C. (3d) 122

British Columbia Court of Appeal
Seaton, Hinkson and Hutcheon JJ.A.

APRIL 26, 1989

Sexual offences — Sexual assault — Elements of offence — Accused school teacher signalling to student — Student then getting under accused's desk and performing sexual act as directed by accused — Constitutes sexual assault although no violence used — Cr. Code, ss. 244, 246.1.

The accused was charged with a number of offences including sexual assault contrary to s. 246.1. The accused was a schoolteacher and the evidence indicated that the accused, while sitting at his desk, would nod to a student and then he and another student would then get under the accused's desk. The accused, while seated at his desk, would undo his zipper and direct the children to perform various sexual acts. The accused was convicted but on appeal argued that there could be no conviction for sexual assault because there had been no assault within the meaning of s. 244(1) of the Criminal Code. Section 244(1)(b) provides that a person commits an assault when "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".

On appeal by the accused from his convictions, held, the appeal should be dismissed. ***[page123]*** Words alone cannot amount to an assault, s. 244(1)(b) requiring that there be an act or gesture by the accused which must amount to an attempt or threat to apply bodily force. However, whether or not an assault has occurred depends on the facts of a particular case. In this case the accused had the students in a confined space, he exposed himself in close proximity to them, and spoke to them telling them what he wanted to do. The acts and gestures of the accused did not amount simply to an invitation but rather constituted a threat to invade the bodily integrity of the victims. Such threats to apply force, coupled with the accused's present ability to effect that purpose, constitute an assault within the meaning of s. 244(1)(b) of the Criminal Code. A threat to invade the bodily integrity or otherwise apply force to the victims is itself a hostile act and the accused was properly convicted.

Director of Public Prosecutions v. Rogers, [1953] 2 All E.R. 644: R. v. Rolfe (1952), 36 Cr. App. R. 4, consd

Other cases referred to

R. v. Chase (1987), 37 C.C.C. (3d) 97, 45 D.L.R. (4th) 98, [1987] 2 S.C.R. 293, 59 C.R. (3d) 193, 80 N.R. 247, 82 N.B.R. (2d) 229; Fairclough v. Whipp, [1951] 2 All E.R. 834; R. v. Burrows (1951), 35 Cr. App. R. 180; R. v. McCallum, [1970] 2 C.C.C. 366; R. v. Baney (1972), 6 C.C.C. (2d) 75, [1972] 2 O.R. 34, 17 C.R.N.S. 261

Statutes referred to

Criminal Code, ss. 157 (repealed 1987, c. 24, s. 4), 244 (rep. & sub. 1980-81- 82-83, c. 125, s. 19), 246.1 (enacted idem) -- now R.S.C. 1985, c. C-46, ss. 161, 265, 271

APPEAL by the accused from his conviction for sexual assault contrary to s. 246.1 of the Criminal Code.

G. McKinnon, for accused, appellant.

E. Bennett, for the Crown, respondent.

The judgment of the court was delivered by

HINKSON J.A.

HINKSON J.A.:— The accused was charged with seven counts of sexual assault contrary to s. 246.1 of the Criminal Code and three counts of gross indecency contrary to s. 157 of the Criminal Code involving five young boys.

The indictment covered three periods of time.

1. December 15, 1985 -- January 9, 1986 (counts 1 to 7)
2. April 7, 1985 -- May 31, 1985 (count 8)
3. September 21, 1985 -- January 9, 1986 (counts 9, 10)

The accused was a Grade 4 schoolteacher at West Vernon Elementary School during the school years 1984-85 and 1985-86. The seven counts of sexual assault involved five young boys aged nine and ten who were pupils in the Grade 4 class taught by the accused. The counts were particularized by the Crown in one of two ways: the accused had the victim fellate him or touch his ***[page124]*** penis. Three counts of gross indecency involved four of the five boys in circumstances similar to the facts alleged in support of the sexual assault offences.

At trial, the accused was found guilty on all 10 counts. The trial judge accepted as truthful the evidence of the five complainants and other supporting witnesses and rejected the accused's denial of the acts.

The evidence at trial revealed that the classroom was set up in such a way that the desk of the accused was to the side of the classroom. The accused, while sitting at the desk, would nod to a

student and he and another would come up and get under the desk. Then the accused, while seated at the desk, would undo his zipper and take his penis from his pants and direct the children to "rub it", "jack it" or "give him a blow job".

The children followed the instructions of the accused and fellated him, masturbated him, or both.

On this appeal, no complaint is made of the three convictions for gross indecency.

The issue on this appeal is whether or not the activity at the desk constituted a sexual assault upon the children by the accused. It is asserted on behalf of the accused that the evidence did not disclose that he had applied any physical force to the complainants or ever attempted or threatened to do so. Therefore, it is contended there was no evidence to support a finding that an assault within the definition of s. 244(1) of the Criminal Code had occurred. The accused concedes the sexual nature of the acts and, therefore, it is necessary only to consider whether the evidence will support a finding of assault. Section 244(1) of the Criminal Code provides:

244(1) A person commits an assault when

(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.

In R. v. Chase, (1987), 37 C.C.C. (3d) 97, 45 D.L.R. (4th) 98, [1987] 2 S.C.R. 293 (S.C.C.), McIntyre J. delivering the judgment of the court considered the new sexual assault provisions of the Criminal Code and the relationship of assault as defined by the Criminal Code to the concept of assault at common law. He stated at p. 100:

[page125] The new sexual assault provisions of the Criminal Code ... 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 ss. 244 and 246.1. 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, s. 244(1), where an assault is defined in terms similar, if not identical, to the concept of assault at common law.

In s. 244(1) of the Code the term "assault" is used (as it was at common law) to include both an assault and a battery. Section 244(1)(a) refers to activity which would constitute a battery at common law, whilst s. 244(1)(b) is similar to an assault at common law.

Dealing with battery at common law, Salmond, The Law of Torts, 17 ed., p. 120, states:

The application of force to the person of another without lawful justification amounts to the wrong of battery. This is so, however trivial the amount or nature of the force may be, and even though it neither does nor is intended nor is likely or able to do any manner of harm. Even to touch a person without his consent or some other lawful reason is actionable. Nor is anger or hostility essential to liability: an unwanted kiss may be a battery.

It is clear from these words that an "application of force" does not necessarily require an exertion of strength or power, but can include any act of unwanted physical interference with the person of another. This point is made by Salmond when he states at p. 5:

The term "forcible" is used in a wide and somewhat unnatural sense to include any act of physical interference with the person ... of another. To lay one's finger on another without lawful justification is as much a forcible injury in the eye of the law, and therefore a trespass, as to beat him with a stick.

It is because the purpose of the law in this area is to protect the bodily integrity of the individual that even the most trivial interference with another may be actionable. Discussing battery, Fleming, The Law of Torts, 5th ed. (1977), p. 23, states:

Of the various forms of trespass to the person the most common is the tort known as battery, which is committed by intentionally bringing about a harmful or offensive contact with the person of another. The action, therefore, serves the dual purpose of affording protection to the individual not only against bodily harm but also against any interference with his person which is offensive to a reasonable sense of honour and dignity. The insult in being touched without consent has been traditionally regarded as sufficient, even though the interference is only trivial and not attended with actual physical harm.

Dealing with assault at common law, Fleming states at p. 24: "Assault consists in intentionally creating in another person an apprehension of imminent harmful or offensive contact." The learned author continues at p. 25:

[page126] It is sometimes categorically asserted that some bodily movement is essential to assault: that neither passive inaction nor mere words, however offensive, are sufficient. But this is only true to the extent of restating the overriding requirement that the victim must have apprehended imminent physical contact. For there is neither reason nor authority that the command of motionless highwaymen "Stand and Deliver" would not qualify. Words may also give colour to an act that might otherwise be inoffensive, as where a man follows up an immoral suggestion to a girl by menacingly advancing towards her.

Linden, The Law of Torts, 3rd. ed., p. 41, is to the same effect.

Under the Criminal Code, it is clear that words alone cannot amount to an assault because s. 244(1)(b) requires an "act or gesture" by the accused. Further, this act or gesture must amount to an attempt or threat to apply force.

Counsel for the accused contends that there was no assault committed. He relies upon a line of authorities commencing with the decision in Fairclough v. Whipp, [1951] 2 All E.R. 834 (K.B.), as support for his submission that where the accused merely invites the complainant to commit a sexual act upon him, the accused is not guilty of an assault.

In Fairclough v. Whipp, supra, the facts were that the accused was charged with committing an indecent assault on a child of the age of nine. The question was whether there was an assault. The accused was "making water" by the bank of a river where there were four young girls varying in age from six to nine. As he did so, one of the girls passed him. He, with his person exposed, said to her, "Touch it" and she did so. He then went away. The question for decision was whether that conduct amounted to an indecent assault. Lord Goddard C.J. said at p. 834:

An assault can be constituted, without there being battery, for instance by a threatening gesture or a threat to use violence against the person, but I do not know any authority which says that where one person invites another person to touch him that can be said to be an assault ... I cannot hold that an invitation to somebody to touch the invitor can amount to an assault on the invitee ... It seems to me there must be an act done to a person.

The court concluded no assault had occurred.

In R. v. Burrows (1951), 35 Cr. App. R. 180 (C.C.A.), the accused was charged with indecent assault on a boy. The evidence of the boy was that the accused exposed himself to him and asked the boy to masturbate him. The boy further said that the accused did not attempt to touch his (the boy's) private parts. The court concluded that the accused had only invited the boy to touch him. There was no assault because there was no threat or hostile act by the accused against the boy.

In Director of Public Prosecutions v. Rogers, [1953] 2 All E.R. ***[page127]*** 644 (Q.B.), the facts were that on two occasions when the accused was alone in the house with his daughter, aged eleven, he put his arm around her shoulders, and led her upstairs and there exposed his person to her and told her to masturbate him. He used no force or compulsion and the child made no objection or resistance. On the second occasion, knowing the nature of his intention, she did not wish to accompany him upstairs, but again she neither objected nor resisted but submitted to his request. It was held that there was no assault on her. Lord Goddard C.J. said at p. 645:

Before you can find that a man has been guilty of an indecent assault, you have to find that he was guilty of an assault, for an indecent assault is an assault accompanied by indecency, and, if it could be shown here that the respondent has done anything towards this child which, by any fair use of language could be called compulsion, or had acted, as I have said in other cases, in a hostile manner toward her--that is, with a threat or a gesture which could be taken as a threat, or by pulling a reluctant child towards him-- that would, undoubtedly, be assault, and, if it were accompanied by an act of indecency it would be an indecent assault.

Following the reasoning in Fairclough v. Whipp, the court held that the father had simply invited the daughter to touch him and this did not constitute an assault.

The decision in Fairclough v. Whipp has been applied in Canada in R. v. McCallum, [1970] 2 C.C.C. 366 (P.E.I.S.C.), and R. v. Baney (1972), 6 C.C.C. (2d) 75, [1972] 2 O.R. 34, 17 C.R.N.S. 261 (Ont. C.A.). Based upon these authorities the accused contends that there is no evidence to support a finding that he threatened, by an act or gesture to apply force to any of his victims and that, therefore, he was not guilty of assaulting any of them.

The authorities cited by counsel for the appellant should be contrasted with another decision of Lord Goddard, made the year after Fairclough v. Whipp. In R. v. Rolfe (1952), 36 Cr. App. R. 4 (C.C.A.), the circumstances were that the complainant was travelling in a train in a compartment in which she was the only passenger when the appellant joined her. While the train was in motion, the appellant undid his trousers and, with his person exposed, came towards her, inviting her "to have connection with him'. Lord Goddard C.J. said at pp. 5-6:

The first thing to observe is this: one can very seldom take some rule which has been laid down in another case and apply it to the case under consideration, irrespective of the facts of that particular case. Secondly, the offence of assault is often confused with the offence of battery. An assault can be committed without touching a person. One always thinks of an assault as the giving of a blow to somebody, but that is not necessary. An assault may be constituted by a threat or a hostile act committed towards a person, and if a man indecently exposes himself and walks towards a woman with his person ***[page128]*** exposed and makes an indecent suggestion to her that, in the opinion of this court, can amount to an assault.

It is to be observed that unlike the line of cases following the decision in Fairclough v. Whipp, supra, Lord Goddard concluded that the circumstances then before the court, namely, the man indecently exposing himself, walking towards a woman with his person exposed and making an indecent suggestion to her, amounted to an assault. There the court was dealing with a situation which took place within a confined space, with threatening behaviour on the part of the man accompanied by words which amounted to an indecent suggestion. Unlike the circumstances in Fairclough v. Whipp, supra, Lord Goddard did not treat the statement by the man as an invitation, rather he regarded it as an indecent suggestion.

In the present case, the accused would nod to a student signifying that he was to come and get under the desk then the teacher would undo his trousers to expose his penis, lean down and speak to the student or students beneath his desk and tell them to masturbate him or commit fellatio.

Counsel for the accused sought to describe that conduct as an invitation. In doing so, he was seeking to bring the facts of this case within the line of decisions following on Fairclough v. Whipp, supra.

As Lord Goddard observed in Rolfe, supra, in this area of the law the decision as to whether or not an assault has occurred depends upon the facts of the particular case. On the facts of this case, the accused had the students in a confined space, he exposed himself in close proximity to them, then he spoke to them telling them what he wanted them to do.

In my opinion, the acts and gestures of the accused, in the circumstances of this case did not amount simply to an "invitation" as in Fairclough, but rather, as in Rolfe, they constituted a

threat to invade the bodily integrity of the victims. Such threats to apply force, coupled with the accused's present ability to effect that purpose, constitute an assault within the meaning of s. 244(1)(b) of the Criminal Code.

The accused also contended that the evidence did not reveal that there was any hostile act by the accused with respect to his victims. In my opinion, a threat to invade the bodily integrity or otherwise apply force to the victims is itself a hostile act: see D.P.P. v. Rogers, supra.

In the result, I conclude that the trial judge did not err in convicting the accused of sexual assault upon his victims. I would dismiss the appeal.

Appeal dismissed. ***[page129]***