Court File No. CR-22-00000484

SUPERIOR COURT OF JUSTICE

HIS MAJESTY THE KING

v.

JACK DENSMORE

# R E A S O N S  F O R  J U D G M E N T

BEFORE THE HONOURABLE MR. JUSTICE J. KRAWCHENKO
on July 26, 2024 at HAMILTON, Ontario

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APPEARANCES:

B. Sosa — Counsel for the Crown

M. Fahmy — Counsel for Jack Densmore

Publication Ban

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SUPERIOR COURT OF JUSTICE

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R E A S O N S  F O R  J U D G M E N T

KRAWCHENKO J. (Orally):

By way of introduction, Mr. Densmore, the accused, stands charged with one count of sexual assault against [redacted], the complainant. The trial was conducted without a jury. We have returned today for my decision.

The basic legal principles are such that the accused entered his trial presumed innocent. The burden of proof was and continued throughout the trial to be on the Crown to prove guilt beyond a reasonable doubt. That evidentiary burden never shifted, the accused was not required to prove anything. In the charged offence of sexual assault, the Crown was required to prove each of the following essential elements beyond a reasonable doubt:

(a) That Jack Densmore touched [redacted] directly or indirectly;

(b) that the touching by Jack Densmore was intentional;

(c) that the touching by Jack Densmore took place in circumstances of a sexual nature; and

(d) that consent was not present at the time the

touching in question took place.

The complainant and the accused both testified at trial. The accused was not required to testify, but he elected to do so. His testimony needed to be assessed, like the testimony of any other witness. The court could accept all, part or none of Mr. Densmore's evidence. If the court believed the testimony of the accused that he did not commit the offence charged, the court would find him not guilty. If the court did not believe the testimony of the accused but was left with a reasonable doubt about an essential element of the offence charged, the court would find him not guilty of the offence. Even if the testimony of Mr. Densmore did not raise a reasonable doubt about his guilt or about an essential element of the offence charged, if, after considering all of the evidence, the court was not satisfied beyond a reasonable doubt of his guilt, the court would find him not guilty of the offence.

In assessing the evidence and determining how much or how little of the testimony to believe or rely on, the court was required to assess the credibility and reliability of the witnesses. Credibility having to do with the witness's truthfulness and reliability, referring to the accuracy of the witness's testimony. It is important to note that a witness whose evidence on an issue was not credible, could not give reliable evidence on the same point; however, credibility

is not a substitute for reliability, where a credible witness could still provide unreliable evidence. In short, this court was required to assess all the evidence while retaining the overriding discretion to decide how much or how little of the testimony of any witness to believe and/or to rely upon.

Before proceeding to the analysis of the evidence, the defence raised the potential of collusion and argued that because the complainant had been in contact with family, friends and specifically her therapist following the evening at Densmore's home, that she was influenced by them to such a degree, either consciously or unconsciously, that had coloured or tainted her interpretation of the impugned events. The defence relied on supportive communications exchanged between the complainant and her immediate family and friends after the alleged assault that encouraged the reporting of the incident to police and that tended to demonize the accused. Additionally, the defence relied upon communications from the complainant's therapist made prior to her reporting the incident to police that also cast aspersions on the accused.

With regard to this argument, what is advanced is not collusion, which has conspiratorial overtones, and which would bring into question the credibility of the complainant, but rather what was really suggested was an inadvertent tainting

of the complainant's evidence affecting only its reliability. I find no merit in this argument.

The nature and context of these communications was simply indicative of a supportive network of people that wanted to help the complainant in whatever manner they could. Family and friends provided comfort, and the therapist provided suggestions that had a therapeutic objective. The fact that the people with whom the complainant had contact with encouraged her to report the incident to police or made disparaging remarks about the accused without having been present at the incident or knowing him, had no effect on the reliability of the complainant's evidence as related to the critical issues in this trial that revolved around the essential elements of the offence.

THE EVIDENCE

I turn now to the evidence. Pursuant to Section 655 of the *Criminal Code of Canada*, the accused admitted, and the Crown accepted certain facts by way of an agreed statement of facts, an "ASF". which was filed as Exhibit 12 at trial. The most significant of the facts admitted were jurisdiction, date of the allegations and identity of the accused. The ASF also set out a number of other facts that had little impact on the determination in this case.

Evidence where there was Little or No Disagreement:

Although there were some minor discrepancies in their respective recollections relating to the lead up to the sexual contact, what emerged from the testimony of both complainant and accused was the following:

At the time of the alleged offence, both the accused and complainant were adults. Mr. Densmore was a self-employed YouTube personality producer, and the complainant was a university student who was working during the summer. Both parties did not know each other. However, in 2019, the complainant and Mr. Densmore were both at the same university homecoming; the complainant as a student participant, and the accused as part of his job filming it for his YouTube channel. Although they did not meet at that time, Mr. Densmore selected a photo of the complainant taken at the event and included it on the cover page of his homecoming YouTube video.

One year after the homecoming and during the COVID pandemic, the parties were matched to each other through a dating app they were using. Mr. Densmore recognized the picture of the complainant and swiped right. The complainant recognized Mr. Densmore and also swiped right. This made the match. Mr. Densmore initiated the contact with the complainant. They both exchanged a number of

text messages and ultimately arranged for a date. The first date fell through. A subsequent date was arranged, and the complainant agreed to meet Mr. Densmore at his home to go for a hike and then to have drinks.

The complainant arrived at Mr. Densmore's home at 8:35 p.m. She was given a tour of the house, which took approximately 15 minutes, and then the two of them left by car. They drove for approximately 10 to 15 minutes, and when they arrived to their intended destination, they both agreed it was too late and dark for a hike and agreed to return to Mr. Densmore's home. Based upon the time estimates agreed upon by both parties, the accused and complainant would have returned to Mr. Densmore's home between 9:10 and 9:15 p.m.

Upon returning to his home, Mr. Densmore offered the complainant a drink, which she declined. Mr. Densmore then asked if the complainant wanted to go upstairs to his bedroom to watch television. She agreed. Once in his room, both parties sat beside each other on his bed and started to watch television. While in Mr. Densmore's bedroom, the parties engaged in sexual activity that was broken down into four distinct phases, starting with kissing, followed by touching over and under clothing, including the complainant's exposed breasts and digital penetration of her vagina. Third, being oral sex, and the fourth being

unprotected sexual intercourse. The complainant left Mr. Densmore's home at approximately 9:46 p.m. Based upon the evidence of both the accused and the complainant, they would have been together in his bedroom for no longer than 36 minutes.

Conflicting Evidence:

In describing their evening together, and specifically with regard to the four phases of sexual activities that occurred, the accused and complainant did provide details that differ, some minor, others more significant. I will only address the significant differences in their evidence and the implications of same.

The accused testified that the complainant consented to all four phases of sexual activity through groaning, moaning, use of specific words and her actions. The complainant disagreed. The complainant testified that while the first phase of kissing was consensual, on two occasions during the second phase of the sexual activity, she communicated through actions and words her disapproval and lack of consent. The first occasion was when the complainant was sitting on the accused. She testified that the accused bit her exposed breasts and she then pushed him away and leaned herself off him, signalling her lack of consent. The complainant testified the biting of her breast was painful and resulted in redness and swelling that persisted for several days after.

In the ASF, the sexual assault nurse who examined the complainant's breasts the day following the alleged assault, noted no injuries. The accused denied both the biting of the breasts and the pushing away. In this conflicting evidence, I find that communication of disapproval or lack of consent did not occur in the manner or with the intensity that the complainant described and accept the evidence of the accused on this point, as supported by the medical evidence.

The second incident of communicating disapproval was during digital penetration, when the complainant testified, she said, "Ow" to the accused. The accused denied hearing this communicated disapproval or withdrawal of consent as having occurred. In cross-examination, the complainant agreed that during the second phase of sexual activity that included the push and the utterance "Ow", that she was kissing the complainant back, and when asked,

> QUESTION: Okay. So, that's a way you could have shown that you were still interested in what he was doing, right?
> ANSWER: It could have been.

On this conflicting evidence, I also find the communication of disapproval or lack of consent did not occur in the manner the complainant described and accept the evidence of the accused

on this point. Notwithstanding my findings that these two incidents did not occur as stated by the complainant, I do accept the evidence of the complainant that during the second phase and leading up to phase three of her encounter, the complainant was having some misgivings about how far things had gone and wanted to end the evening and leave.

At phase three, being oral sex, the accused maintained that this was completely consensual and that any issue that the complainant had regarding his videotaping of that activity, which I will address in more detail shortly, was resolved to the complainant's satisfaction. The complainant took a different position on this. I turn now to the videotaping incident.

The accused testified that during oral sex he picked up his cell phone and started filming the complainant. When the complainant saw this, the accused told her that he was making a consent video. The complainant denied that this was said. On this specific point, it is very odd that the accused would contemplate making a video to confirm consent after the start and during oral sex without first obtaining consent of the complainant to do so. His explanation and rationale for this was simply too incredible to believe. I reject the evidence of the accused that he was making a consent video, whatever that really is, or that he told the complainant that he

was trying to film one. This evidence seemed to have been made up by the accused in order to justify and explain away the introduction of his cell phone at this point of his intimate encounter with the complainant.

Deletion of the Video:

The accused testified that when the oral sex stopped and the complainant told him that she did not agree to being filmed, he showed her his phone. He then deleted the video in front of the complainant. He then went further to show her on another function on his phone, how he was deleting the deleted video, thus making the initial deletion a permanent deletion.

The complainant's testimony regarding the phone differed. She testified that she was caught by surprise when she looked up during oral sex and saw the accused videotaping her. She clearly communicated to the accused that she did not agree to being taped, and in response to that, the accused simply put the phone down. Contrary to what the accused stated regarding the deletion of the video, the complainant was emphatic in her cross-examination and remained unshaken that she did not witness any deletion of any videos. She did not even see the phone screen. The complainant was not even sure if the accused had taken a photo or a video of her. With regards to this area of conflicting evidence relating to the

deletion of the video, the complainant was credible, and I reject the evidence of the accused as unworthy of belief.

This conclusion is also supported by the evidence elicited from the complainant in cross-examination about her most significant concern after leaving Mr. Densmore's home, being the existence of an intimate video of her and the potential impact of this on her in the future. If she had witnessed the double deletion that Mr. Densmore testified to, she would not have had those concerns. In short, having considered all the evidence on the issue of the video, I reject the testimony of the accused as unworthy of belief. The evidence of the complainant on this point, was logical and believable.

In her testimony in-chief, the complainant stated that after the video incident, she got up and wanted to leave. In cross-examination and based upon the time estimates the complainant had given on how long the oral sex lasted, being five to ten minutes, and the timeframe when the video was made, approximately two minutes, defence counsel suggested to the complainant that after the phone was put down, there were a few minutes left and that she continued to perform oral sex, to which she responded it was possible. This was raised a second time in cross-examination when she clarified her evidence in stating that, while it could have been possible, she did not remember

doing that.

Nothing turned on whether the complainant engaged or did not engage in further oral sex after the phone was put down. These answers given on cross-examination did not diminish or adversely affect the credibility of the complainant, it simply highlighted that the time estimates she had given were not particularly reliable.

In summary, in regard to the conflicting evidence, I conclude that the complainant started to have subjective misgivings about her sexual activity with the accused before the oral sex occurred. These initial misgivings crystallized both in the form of a subjective withdrawal of consent during the course of oral sex and were then communicated in words to the accused when he tried to film the complainant, and she said that that was not okay. At this moment, it ought to have been clear to the accused that he had overstepped.

The final significant conflicting evidence came regarding the fourth phase of the sexual activity, first relating to the preparation for the unprotected sexual intercourse and then with the consent to the execution of same.

The accused testified in-chief that after the oral sex ended, he told the complainant to stand up, asked her to turn around, reached around her, and penetrated her digitally and removed her

underwear. He testified that the complainant did not assist him in the removal of her underwear, he pulled them down to her knees from where they fell to the floor. Additionally, the accused testified that he, with the assistance of the complainant, pulled her entire dress off and it too fell to the floor.

The complainant's evidence was that when she got up from the floor after the oral sex ended, she pulled up her dress straps and covered her breasts and pulled down her dress and turned to the bed to retrieve her shirt that she had removed earlier. No words were exchanged between the complainant and accused. The accused continued to kiss her. She did not kiss him back. He turned her around and bent her face down on the bed. He pulled her dress up and pulled down her underwear. He entered her without asking and without a condom and ultimately ejaculated on her back. She testified that she remained passive throughout this fourth phase of the sexual activity.

With regard to the conflicting accounts of how the complainant came to be positioned for intercourse and the way her dress was removed, I reject the testimony of the accused on these points. I accept the testimony of the complainant as being logical and that she had already had serious misgivings after the video incident. She rose, started to dress herself, at which point the accused continued to kiss her, touch her, and

moved her to the bed. He removed her underwear and pushed her dress up to expose her vagina. The complainant did not assist the accused to completely remove her form-fitting dress, which would have left her completely naked on the bed.

Turning now to the conflicting evidence on the issue of consent and to the execution of the unprotected sexual intercourse. The complainant's evidence was that there was no consent to this activity. She was passive and although she knew it was happening to her, it felt like it was not. She felt like she had left her body.

Mr. Densmore testified that the complainant communicated her consent and approval to this fourth phase of sexual activity by asking him to spank her and by encouraging and directing him to intercourse by saying, "Yeah, yeah, fuck me, fuck me hard, fuck me daddy, fuck me with your big dick". It should be noted that the complainant was not cross-examined on these alleged words of direction or encouragement that she was said to have uttered, which supported the narrative of the accused that they were words of consent upon which he relied. I note that the accused testified to these alleged utterances in a manner that was flip and appeared to be made up on the spot.

On the point of steps taken by the accused in determining consent for intercourse, the accused testified in cross-examination as follows:

QUESTION: You also didn't take any steps to get her consent when you entered her from behind?
ANSWER: What do you mean by taking steps?
QUESTION: I'm suggesting to you — took — oh, that you took no steps?
ANSWER: What does — sorry, I don't know what you mean by taking steps, like asking her, hey, can I put my penis into your vagina right now at this second?
QUESTION: You tell me. Was that a step you took?
ANSWER: I did not ask her if I could put my penis into her vagina.
QUESTION: Right.
ANSWER: I was going based off her body language, her moaning and her saying that she liked it when I touched her.

The accused painted a confusing picture in his evidence relating to pursuing intercourse. On one hand, he was receiving specific verbal instructions, which he appeared to equate to consent in the form of the words, fuck me, etcetera, which I rejected as unworthy of belief. On the other hand, he testified that he did not ask to have penetrative intercourse, but rather took his cues from the complainant's body language, her moaning and the complainant saying she liked it when he touched her.

What flowed from Mr. Densmore's evidence was that he did not have expressed verbal communicated consent to proceed to unprotected intercourse. This court, having found that the utterances, fuck me, et cetera, were not made. At best, what Mr. Densmore had were reactions of the complainant at that moment that when viewed objectively as described by him, could possibly have been seen as ambiguous and in the circumstances, and that he mistook them to be consent. It must be made clear, the mere absence of no or silence or acquiescence or reliance on earlier consent to other sexual activity could not give rise to this defence.

The question then was, did Mr. Densmore have recourse to the defence of mistaken belief?

Section 273.2 of the *Criminal Code* addresses this mistaken belief defence. The provision sets out that where there is no evidence of the complainant's voluntary agreement, affirmatively expressed by words, which I have found did not occur, or by conduct, which at best was ambiguous, it is not a defence that the accused believed that the complainant had consented to the activity where he was reckless or willfully blind to the facts or took no reasonable steps in the circumstances to ascertain consent. On the facts, I find that the accused was, at worst, reckless when he proceeded with intercourse, being aware that there was a danger that this risky conduct

may have been unwelcome, but took a chance, or, at best, willfully blind, having a suspicion that intercourse was not welcome, knew that further inquiries needed to be made, but chose not to make them. He took no reasonable steps to ascertain if the complainant would consent to intercourse, steps needed only to be objectively reasonable, but assessed subjectively in light of the circumstances known to the accused at the time.

One asks, what did the accused know about the complainant at the time? Nothing. They were strangers. They had been together in his room for less than an hour. This was a classic scenario where mistakes and miscommunications were more likely to and did occur because they were strangers. Additionally, the accused was preparing to undertake an invasive and potentially risky sexual activity of unprotected vaginal intercourse immediately following his attempt to videotape oral sex. The context of this interaction demanded, at a minimum, that he pause, regroup and obtain affirmative communicated consent before proceeding further. He did nothing.

APPLICATION OF FACTS TO THE LAW

Returning to the four essential elements of sexual assault that the Crown was required to prove beyond a reasonable doubt:

(a) That Jack Densmore touched [redacted] directly or indirectly;

(b) that the touching by Jack Densmore was intentional;

(c) that the touching by Jack Densmore took place in circumstances of a sexual nature; and,

(d) that consent was not present at the time of the touching in question took place.

The *actus reus* of this charge required the Crown to prove elements (a), (b) and (c) in the absence of consent. The first two elements are objective, while the third element consent is subjective. I find that the Crown has discharged its evidentiary onus and proved the objective elements.

With regard to the third element of consent, the consent element of the *actus reus* is only concerned with the complainant's perspective and state of mind towards the touching at the time it occurred. I find the Crown has also discharged its evidentiary onus and proved the lack of consent in two ways. First, through the credible evidence of the complainant about her internal and subjective misgivings just prior to and during oral sex, in deciding that she was not comfortable and did not want to go further, a decision which was manifest in words and actions of further lack of consent at the time the accused attempted to

make a videotape recalling the mere absence of no or silence. Subsequent passivity or acquiescence were not consent. In these circumstances, all that was available to the accused was the defence of mistaken belief, which as I have outlined, could not succeed due to Mr. Densmore's recklessness, willful blindness and failure to take any reasonable steps in the circumstances to ascertain if the complainant consented to unprotected sexual intercourse.

For the foregoing reasons, I find the accused guilty as charged.

**FORM 3**

**ELECTRONIC CERTIFICATE OF TRANSCRIPT (SUBSECTION 5(2))**

***Evidence Act***

I, Janet Smith, certify that this document is a true and accurate transcript to the best of my skill and ability (and the quality of the copy of the recording and annotations therein) of the recording of Rex v. Jack Densmore in the Superior Court of Justice at HAMILTON, ON, taken from Recording No: 4799 604 20240726 095327 10 KRAWCHJ.dcr, which has been certified in Form 1.

August 27, 2024
Date

Signature of Authorized Person
Janet Smith
ACT # 2474492821
Signed in Ontario, Canada
asapcourttranscripts@gmail.com

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