

Case Name:
R. v. Rana

Between
Her Majesty the Queen, and
Karamvir Singh Rana

[2010] A.J. No. 697

2010 ABPC 158

2010 CarswellAlta 1120

88 W.C.B. (2d) 700

Docket: 090958679P1

Registry: Edmonton

Alberta Provincial Court

L.G. Anderson Prov. Ct. J.

May 10, 2010.

(23 paras.)

Counsel:

C.D. Godfrey, for the Crown.

B. Mohan, for the Accused.

Judgment

L.G. ANDERSON PROV. CT. J.:--

Facts

- 1 The accused is charged with sexually assaulting a store clerk while shopping.
- 2 A clerk in a clothing store has testified that the accused asked her to try on a shirt, blazer and skirt that he intended to buy for his wife. She tried on the clothes and when displaying the fit, the accused put his hand under the skirt and touched her thigh with the back of his hand. Then, in broken English, he asked something about whether the top could be worn without a bra and reached out with both arms, touching both breasts. After the clerk retreated, she changed back into her clothes, got a sweater from the staff room to cover up and when she attended again to the customer, he said he would be back and left. Before leaving, he asked if she was angry or upset.
- 3 Later, according to the evidence, the clerk was crying and the assistant manager called mall security who ultimately located the accused and banned him from the mall. Still later, the police charged him.
- 4 The accused has testified that he did go into the store and asked the clerk to try clothes on. He was shopping for his wife and the clerk was about the same size. The accused agrees that he touched the skirt while the fit was being displayed but if he touched the thigh while checking the fabric, this was not intended. He did not touch the clerk's breasts as alleged or at all. After the clerk came out of the change room, the accused decided against buying the clothes and he left, only to be approached by security later on for no good reason.
- 5 The Crown called a security guard who gave narrative evidence which included hearsay about an incident in another store which was neither helpful nor properly admissible.
- 6 The Defence called the accused's wife who testified credibly that she in fact received clothing from the accused for her birthday which was a few days after this event. She is also about the same size as the store clerk.
- 7 The complainant was not impeached in cross-examination although she did acknowledge one inconsistency between her testimony and a statement given to police. Her testimony indicated that the accused had initially touched his *own* thigh to demonstrate the length of skirt for which he was looking. In her original statement she recounted that he had in fact touched *her* thigh to demonstrate the length of skirt that he was wanting to buy.
- 8 The complainant also agreed under cross-examination that the accused had a language difficulty. She needed clarification of the vague question suggesting that there was some confusion concerning the event. Perhaps most saliently, the complainant was uncertain in answer to the suggestion that when the accused touched her breasts, the accused said something about a tight fit. The significance of that is not in the answer but in the question.
- 9 It was never suggested to the complainant that the accused did not in fact touch her breasts.

10 The accused was cross-examined and maintained the essence of his original account although at one point the accused's categorical denial that he touched the blazer in the breast area changed to "not so far as I can recall". The Court must be mindful, however, that the testimony was being given through an interpreter. The accused did not provide a logical explanation for why he felt compelled to test the quality of the skirt fabric while it was being worn as distinct from when it was on the hanger. The accused also tended to answer difficult questions with questions such as 'why would I touch someone sexually when my wife is beautiful?' or 'how could I ask about a bra when my English is so poor?'.

The Issue

11 The ultimate issue in this case is whether the Court has a reasonable doubt. The primary determination in pursuit of this question is the credibility of, firstly, the accused. If his testimony is believed, it would constitute a defence and that would end the matter. If it raises a doubt, that also ends the matter. If the accused's testimony does not raise a doubt the Court must still look at all of the evidence and decide whether a doubt exists. This is the approach mandated by the oft-cited authority of *R. v. W.(D.)*, [1991] 1 S.C.R. 742.

12 The approach that the Court must take in this case is clear. The more difficult questions, relating particularly to the alleged touching of the breasts, are twofold: firstly, in the first and second lines of inquiry in *W.(D.)*, how does the Court assess the credibility of what is effectively a bare denial? Secondly, what is the significance of the failure by defence counsel to put to the witness that the accused never in fact touched her breasts and the actual suggestion that her breasts were touched but as an innocent consequence of checking the fit?

Assessing The Credibility of a Bare Denial

13 The accused in this case has denied that he touched the breasts of the complainant and there is no independent evidence to contradict the denial apart from the complainant.

14 The accused's denial is given under oath but a denial, standing on its own is just that, sworn or not. It is impossible to assess the veracity of a denial without more. The strength of a denial depends entirely on context.

15 If the only context is the testimony of the complainant, then it seems that for all intents and purposes, the assessment of a bare denial, without more, is the much same as the analysis under the third leg of *W.(D.)*. Does all of the evidence, including the denial and the complainant's testimony leave a reasonable doubt? A Court must be careful to not simply balance one version against the other. However, where the only context is the testimony of the complainant, the strength of the complainant's testimony necessarily becomes a significant consideration in assessing the credibility of a denial. An example of the complainant's credibility serving to explain the rejection of a denial can be found in the *post-W.(D.)* decision of *R. v. R.E.M.* 2008 SCC 51:

[66] Finally, the trial judge's failure to explain why he rejected the accused's plausible denial of the charges provides no ground for finding the reasons deficient. The trial judge's reasons made it clear that in general, where the complainant's evidence and the accused's evidence conflicted, he accepted the evidence of the complainant. This explains why he rejected the accused's denial. He gave reasons for accepting the complainant's evidence, finding her generally truthful and "a very credible witness", and concluding that her testimony on specific events was "not seriously challenged" (para. 68). It followed of necessity that he rejected the accused's evidence where it conflicted with evidence of the complainant that he accepted. No further explanation for rejecting the accused's evidence was required.

16 In this case, there is some context within the defence evidence. Firstly, the accused's narrative was consistent with the complainant's in most respects. There is no reason to disbelieve the accused in those aspects of his testimony. The defence evidence also establishes that the accused did indeed send clothing to his wife, it was in fact her birthday five days after this incident and his wife is about the same size as the complainant. These facts help to confirm the narrative that is not in dispute but they do little to inform the one piece of disputed evidence, which is whether the accused grabbed the complainant's breasts. There is nothing in the accused's demeanor that the Court finds notable one way or the other. A few aspects that do tend to detract from the accused's credibility are those problems referred to in paragraph 10. The accused did not provide a logical explanation to why he chose to test the quality of this fabric while it was being worn by a young clerk rather than before or after. The accused's tendency to answer difficult questions with questions also detracted from his credibility, giving the impression that he was being evasive. In terms of contradictions, however, his answers were generally consistent both internally and externally. The only real inconsistency was the accused's denial that he touched the complainant's breasts.

The Discrepancy Between The Theory Reflected In Cross-Examination And The Accused's Testimony

17 During cross-examination, the complainant was asked questions about the alleged sexual touchings. It was put to her firstly that when the accused touched the skirt, he asked about the tight fit. It was then suggested to her several times that when he touched her breasts, the accused said much the same thing. The concluding questions and answers in this line of questioning were:

"Q. When he touched you both times, he was enquiring about, at that time simultaneously, whether the clothes you were wearing at his request, were tight or not, you'll agree with me ma'am, He was doing at the same time?

A. What do you mean at the same time?

- Q. When he touched your skirt, we know you already gave evidence he asked whether it was tight at the bottom, correct?
- A. He did.
- Q. And my question to you is, when he touched your breasts while you were wearing that blazer, he asked you the same question, was it tight for you, do you remember that?
- A. Similar, I don't recall if it was the exact question but I believe.
- Q. But he was enquiring about whether the clothes were a tight fit or a loose fit or whether they fitted properly or how did you feel, that was his enquiry.
- A. I can't get inside his head, I don't know."

18 It is a fundamental principle of ethics that counsel can not put a proposition to a witness that the counsel knows to be untrue. This leaves the question then of what inference should be drawn, if any, from the accused's denial that he touched the complainant's breasts when the suggestion presented to the witness was that he did touch the breasts but in an innocent context.

19 Where counsel fails to put to a witness a material fact that is inconsistent from the anticipated testimony of the accused, a Court can (but need not) draw an adverse inference. This is sometimes called the rule in *Browne v. Dunn*, (1893) 6 R. 67 (H.L.). The rationale is in part to allow the witness to answer a suggested alternate version, as a matter of fairness. It further prevents an accused from making evidence up on the fly. However, an adverse inference might sometimes operate unfairly. For example, a Court would be slow to draw any adverse inference where the failure of counsel to put material inconsistencies might simply be an oversight by counsel or where in the circumstances, putting specific inconsistencies to a witness would simply be redundant in the face a broader contradiction.

20 In this case, the complainant was never presented with the suggestion that her breasts were not in fact touched (although her previous testimony did appear to be mis-stated at one point). This therefore engages the rule in *Browne v. Dunn*. The problem is deeper, however. This is not just a failure to put the accused's version of events to the complainant. Counsel did put a specific version of events to the witness. It contradicted the testimony of the accused, however. In these circumstances, the Court finds that the only reasonable inference is an adverse inference.

21 The Court rejects the accused's denial. Any doubt must arise from the totality of the evidence and most significantly, the testimony of the complainant.

The Testimony of the Complainant

22 The complainant was a very strong witness. She was careful. She gave no indication of any tendency to embellish or distort. She was not impeached. The one contradiction that was earlier referred to in paragraph 7 did not undermine her credibility. It appears to be the result of a memory loss concerning a part of the narrative that was less significant than other parts. The complainant's testimony hung together. In short, the Court finds the complainant to be completely credible and is

not left with any doubt about whether the accused sexually touched the complainant as alleged.

Verdict

23 The Court finds the accused guilty of sexual assault, as charged.

L.G. ANDERSON PROV. CT. J.