Case Name:

R. v. Reddick

Samuel Joseph Reddick, appellant;
v.
Her Majesty The Queen, respondent.

[1991] S.C.J. No. 39

[1991] A.C.S. no 39

[1991] 1 S.C.R. 1086

[1991] 1 R.C.S. 1086

122 N.R. 348

J.E. 91-833

47 O.A.C. 289

64 C.C.C. (3d) 257

5 C.R. (4th) 389

12 W.C.B. (2d) 714

File No.: 21256.

Supreme Court of Canada

1991: March 19 / 1991: May 16.

Present: L'Heureux-Dubé, Gonthier, McLachlin, Stevenson and Iacobucci JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO (12 paras.)

Criminal law -- Sexual assault -- Defence of honest belief that victim consented to intercourse --

Whether there was other evidence to lend defence an "air of reality" -- Whether Court of Appeal erred in substituting conviction for acquittal rather than ordering new trial.

Appellant was acquitted of sexual assault of a fifteen-year-old girl. The trial judge found that the complainant had not consented to the intercourse, but concluded that the evidence relating to her failure to escape, her entry into appellant's car and certain comments she had made constituted independent evidence lending an air of reality to appellant's assertion that he believed she was consenting. The Court of Appeal found there was no evidentiary basis for the defence of honest but mistaken belief. It allowed the appeal and entered a conviction.

Held (Stevenson J. dissenting): The appeal should be dismissed.

Per L'Heureux-Dubé, Gonthier, McLachlin and Iacobucci JJ.: The evidence relied on by the trial judge was incapable of giving appellant's defence any air of reality. The Court of Appeal did not err in substituting a conviction for the acquittal, since the only defence presented is incapable of succeeding and a new trial would serve no purpose but to put the complainant through the ordeal of testifying again.

Per Stevenson J. (dissenting): While there must be some evidence from sources other than the accused to give the defence of mistaken belief in consent an "air of reality", there is no need for independent proof. Here the other evidence was a series of facts which the trial judge very carefully assessed in their totality. The complainant's actions and responses were at least consistent with consent, and in the circumstances of this case were thus sufficient to provide the necessary air of reality.

Cases Cited

By McLachlin J.

Referred to: Pappajohn v. The Queen, [1980] 2 S.C.R. 120.

By Stevenson J. (dissenting)

Pappajohn v. The Queen, [1980] 2 S.C.R. 120.

APPEAL from a judgment of the Ontario Court of Appeal (1988), 31 O.A.C. 246, allowing the Crown's appeal from the accused's acquittal on a charge of sexual assault. Appeal dismissed, Stevenson J. dissenting.

Philip Campbell and John Fitzmaurice, for the appellant.
Kenneth L. Campbell and Catherine A. Cooper, for the respondent.

Solicitors for the appellant: Copeland, Liss, Campbell, Toronto.
Solicitor for the respondent: The Ministry of the Attorney General, Toronto.

The judgment of L'Heureux-Dubé, Gonthier, McLachlin and Iacobucci JJ. was delivered by

1 **McLACHLIN J.**:-- The issue on this appeal is whether the trial judge erred in acquitting the appellant on a charge of sexual assault on the basis that the appellant may have entertained an honest belief that the complainant consented to the sexual intercourse in question.

2 The complainant was fifteen. The appellant was older and married. Sexual intercourse took place between them after they had spent several hours together in an apartment, a McDonald's restaurant and a car. The trial judge found that the complainant did not consent to the intercourse. However, he also concluded that there was evidence capable of lending an "air of reality" to the appellant's testimony that he believed the complainant consented to the intercourse, and acquitted him on the basis of a reasonable doubt as to the appellant's criminal intent. The Court of Appeal allowed the appeal and entered a conviction: (1988), 31 O.A.C. 246. In its view, there was "no evidentiary basis for the doctrine of honest but mistaken belief", per Zuber J.A., at p. 247.

3 The defence of honest but mistaken belief that the victim consented to the sexual intercourse on which the charge of sexual assault is based is available only where it is supported by evidence from sources other than the accused, which lends the defence an "air of reality". As McIntyre J. put it in Pappajohn v. The Queen, [1980] 2 S.C.R. 120, at p. 133:

> To require the putting of the alternative defence of mistaken belief in consent, there must be, in my opinion, some evidence beyond the mere assertion of belief in consent by counsel for the appellant. This evidence must appear from or be supported by sources other than the appellant in order to give it any air of reality. [Emphasis added.]

4 The trial judge found that the evidence relating to the failure of the complainant to escape, her entry into the car and certain comments she made constituted independent evidence lending an air of reality to the accused's assertion that he believed she was consenting to the intercourse. In my view, the Court of Appeal was correct in concluding that this evidence was incapable of giving the accused's defence any air of reality. The circumstances relied on by the trial judge are incapable of providing support for the appellant's assertion that he honestly believed the complainant consented to intercourse.

5 The further question arises of whether the Court of Appeal erred in substituting a conviction for the acquittal rather than ordering a new trial. In my view, it did not. Nothing would be gained by a

new trial. The complainant's evidence at the first trial was accepted without qualification. The only real defence presented -- the defence of honest but mistaken belief in consent -- is incapable of succeeding. A new trial would serve no purpose but to put the complainant through the ordeal of testifying again.

6 I would dismiss the appeal.

The following are the reasons delivered by

7 STEVENSON J. (dissenting):-- I have read the judgment of my colleague Justice McLachlin and must respectfully record my disagreement with her conclusion.

8 We accept the proposition from Pappajohn v. The Queen, [1980] 2 S.C.R. 120, at p. 133, that before the defence of mistaken belief in consent can be "put" there must be some evidence from sources other than the accused to give that defence an "air of reality". The proposition is more easily understood in the context of jury trials as the jury need not be charged on the defence in the absence of some other evidence.

9 Here the judge was the trier of fact. He was satisfied that the complainant did not in fact consent, but recognized that the accused's evidence raised the alternative defence.

10 The issue then became whether the circumstances of this case were capable of providing an "air of reality". That requirement is not phrased in terms of corroboratory or confirmatory evidence; there is no need for independent proof. In my view other evidence consistent with consent is sufficient and the Court of Appeal was in error in saying that there was "no evidentiary basis" for the defence.

11 Here, that other evidence consisted of a series of facts which must be assessed in their totality. The trial judge very carefully made that assessment. This was not a case of silence, per se, but one involving actions and responses at least consistent with consent. It is significant that he had heard the evidence of the complainant and concluded that she was not able "to figure out" what to do to extricate herself from a "continuing and developing situation". That finding lends support to the conclusion that there was an appearance of consent sufficient to provide the necessary "air of reality".

12 I would allow the appeal but reinstate the trial judge's conviction on the second count.

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