

PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R v. Ellison*, 2017 NSPC 5

Date: January 30, 2017
Docket: 2906855
Registry: Sydney

Between:

Her Majesty the Queen

v.

Carl Hugh Ellison

Judge: The Honourable Judge Brian Williston

Heard: December 12, 2016, in Sydney, Nova Scotia

Decision: January 30, 2017

Charges: Subsection 286.1(1) of the **Criminal Code of Canada**

Counsel: Peter Harrison, for the Public Prosecution Services
Greg MacNeil, for the Accused

By the Court:

- [1] The accused is charged in an information that he, on or about August 28th, 2015, at or near Cape Breton Regional Municipality, Nova Scotia, did, communicate with Constable Ashley MacDonald, for the purpose of obtaining, for consideration, the sexual services of Constable Ashley MacDonald, contrary to s. 286.1(1) of the Criminal Code of Canada.
- [2] At the trial the Crown called four witnesses, S/Sgt. Jodie Wilson, Cst. Ashley MacDonald, Cst. Alan Shaw and Cst. Matt Johnson, all members of the Cape Breton Regional Police force.
- [3] The accused did not testify, but his statement to the police given after his arrest at 11:47 p.m. on August 28, 2015, was put into evidence by the Crown with consent by the Defence as a free and voluntary statement.

Facts:

- [4] The facts are not in dispute. Cst. Ashley MacDonald was posing undercover as a prostitute on the evening of August 28th, 2015, in front of Spinner's Mens Wear on Charlotte Street, Sydney, Nova Scotia, in a "sting" operation known as Operation John Be Gone. Spinners was one of three locations which police had targeted due to the frequency of prostitution in those areas. Cst. MacDonald was wearing long black leggings, flip flops and a non-revealing summer top as she strolled in front of Spinners when she, at 6:45 p.m. observed the accused driving around the block a few times before pulling in where she was located. Before he pulled in, she had observed him wink and nod indicating that he was interested in her.

[5] Cst. MacDonald approached the vehicle and asked how he was and what he wanted. The accused answered that he wanted a blow job and the undercover police indicated it would cost \$30.00. The accused did not give or attempt to give her money at that time. He was directed to go around to the back of Spinners. The accused then told Cst. MacDonald that he would go there but that he had to go to the bank first to get more money.

[6] The accused proceeded down Charlotte Street and turned into a fitness parking lot at the bottom of Charlotte Street known as Planet Beach. This was in the opposite direction to the area where he was directed to go. In order to go to the area behind Spinners he would have had to turn left and then make another left. Instead he turned to the right off Charlotte Street. He was arrested as he entered that parking lot. When he was searched later he was found to have \$85.00 cash on his person.

[7] The Crown entered into evidence a statement taken from the accused later that night. That statement was introduced by Cst. Matt Johnson. Cst. Johnson related to the Court that the accused maintained at that time that in the conversation with the undercover officer he was just curious and asking how much something like that was worth, saying that he really didn't fully intend to pick her up.

The Issue:

[8] It is submitted by the Defence that the Crown has failed to prove beyond a reasonable doubt one of the elements of the offence, i.e. that the purpose of the communication was for the purpose of obtaining sexual services.

Analysis:

[9] There is no dispute that in the conversation between the accused and the undercover police officer he communicated for a sexual service and the price for the performance of that act was established. The issue here is whether that conversation was at that time for the purpose of obtaining a sexual service.

[10] The mens rea for this offence requires that the Crown prove an intention at the time of the communication to engage the sexual service of a prostitute. See *R. v. Pake* [1995] A.J. No. 1152 (C.A.), 103 CCC (3d) 524.

[11] The Nova Scotia Court of Appeal in *R. v. N.M.P.*, 2000 NSCA 40, clearly set out that without an intention to engage in sexual service at the time of the communication, no offence would have been committed. There must be something more than the actus reus of mere words of communication.

Chipman, J.A., stated at para. 26 and 27:

[26] In *Pake*, supra, Foisy, J.A. for the court reviewed the legislative history of s. 213, a section enacted for the purpose of abetting the nuisance of street prostitution. After stating the position of the Crown that mere communication with another in public with respect to obtaining sexual services of a prostitute was sufficient to make out the offence, Foisy, J.A. said at p.123:

It is trite law to say that the rules of statutory interpretation require the words of a statute to be given some meaning. In this case the question is, what meaning should be given to the words “for the purpose of engaging the sexual services of a prostitute...”? I think the meaning is clear. Without an intention to engage the sexual services, there is no offence. The Crown has argued that

communication about prostitution should be caught by the section, but nowhere has Parliament seen fit to include the words “about engaging the sexual services of a prostitute.”

[27] The “purpose” of the communication prohibited by the legislation is clear. It is the engaging in prostitution or engaging the sexual services of a prostitute. Such purpose on the part of an accused must be proven as part of the Crown’s case. It is part of the mens rea necessary to be shown. Clearly, this intention or purpose can be inferred from all the circumstances in any given case.

I have applied the decision of the Nova Scotia Court of Appeal in *R. v. N.M.P.* (supra) and the reasoning set out in *R. v. Pake* (supra) in assessing the mens rea requirement in the present case.

In *R. v. Pake* (supra) the Alberta Court of Appeal stated at para.24 and 25:

[24] Requiring intent to be proved will likely have little effect on the number of convictions under this section. The finding of whether or not there was an intention is a finding of fact to be made by the trial judge based on all of the evidence. The intention of the accused may be inferred from the circumstances. In many cases, the content and context of the conversation will lead the judge to conclude that there was an intention. Certainly, in circumstances comparable to those here, and without the accused’s evidence to the contrary or other evidence, a trial judge would be entitled to infer the necessary requisite intent. But even though the intention may be inferred, this does not diminish the requirements that intent be found.

[25] It must be emphasized that in assessing whether the requisite intent existed, the relevant period of time is the time of the communication. That

is because one is guilty of an offence as soon as one commits it, even if one might regret it moments later. Hence, the offence is committed as soon as the communication occurs, assuming the existence of the required intent. A change of heart does not result in an acquittal. Here, it was an open question of fact for consideration by the trial judge whether the accused had the required intent and later abandoned it or never had the intent because he was “just fooling”. The trial judge found on the facts of this case that it was the latter.

Conclusion on all the Evidence:

[12] In his statement to the police after his arrest, the accused maintained that he was “just asking, I was wanting to find out how much something like that was worth.” He told the undercover officer that he would have to go to the bank to get money yet he had \$85.00 on his person when arrested a short time later by the police. Asked by the police as to whether his intention was to go to the bank, he replied in his statement, “I did have money on me but I wasn’t ever, I was gonna drive on and do the same thing driving around some more....I really, you know, I didn’t really fully intend to pick her up.”

[13] In these types of cases, it is always possible for persons to have a change of mind after communicating for the purpose of engaging sexual services of a prostitute, yet the crime would have already taken place if the intent was there at the time of communication. It would be improper speculation on my part to infer that the accused’s intent changed after his communication with Cst. MacDonald. In this case, I do not believe that the accused’s intent changed after his conversation with the undercover officer. He did not drive to the location to which he had been directed and in fact went in the opposite direction. In the words he spoke to the undercover officer as well as in the statement given to the police

after his arrest, I believe that he did not have the intention at the time of the conversation to obtain the sexual services of Cst. MacDonald. Accordingly, I find that the Crown has not proven beyond a reasonable doubt that he had the requisite intention and I find him not guilty as charged.

Brian Williston, JPC