

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Zwicker, 2010 NSPC 7

Date: February 3, 2010

Docket: 1956683

Registry: Halifax

Between:

Her Majesty the Queen

v.

Andrew Marshall Zwicker

Restriction on Publication: S.486.4 of the Criminal Code

Judge: The Honorable Judge Jamie S. Campbell

Decision: February 3, 2010

Charge: CC 271(1)(a)

Counsel: Jennifer MacLellan, counsel for the Crown
Anthony Brunt, counsel for the Defendant

Introduction:

- 1) Andrew Zwicker has been charged with the sexual assault of A.E., (“the complainant”) when she was 14 and he was 19.

- 2) Judges do not have the privilege of being social commentators. Matters such as this one however, must be assessed having regard to the context in which they take place. That requires grappling with a sometimes troubling and often sordid reality.

- 3) Advertisements with the usual earnest admonition to “drink responsibly”, portraying happy, well dressed and attractive people bear little resemblance to what so often happens when young people and alcohol mix. The sound track of laughter, clinking glasses and upbeat music never picks up the belligerence, crying and vomiting that sometimes mark the unscripted and unproduced events of the real world.

- 4) No one really wants to see the uncomfortable “real world” picture. Here it involves a 14 year old girl, drinking wine and beer with her older sister and her friends to the point where she was, to use her words “ drunk but not loaded”. Despite concerns being expressed about the safety of the drunk 14 year old girl by her supposedly protective older friends, the allegation arises that she was sexually assaulted, on the hood of a car, not far away from where they were partying.

- 5) The allegation is that the sexual assault took place at an outdoor “party” in a rural area just outside Halifax. The event was a gathering of people around a large bonfire.

6) The complainant says that she and Andrew Zwicker left the area immediately around the bonfire and walked up to another building described as a “trailer” or an “A- frame”. She said she wasn’t frightened at the time. Her older friends were concerned that he might be singling her out as a target for sex. She did not share those concerns. She said that she went off with him without the slightest concern.

7) Andrew Zwicker went around the building checking the doors and peering in the windows. She says that he asked her when her birthday was. They kissed. She agreed to that. She also agreed to his fondling her breasts. He picked her up and carried her to a white car. She believed he set her down on the hood but it could have been on the trunk. “I don’t know to be completely honest”. She said that it was more than a year and a half ago and , “I was drinking”.

8) She said he asked if he could “finger” her. She says she said “yes”. Her pants were down. She said she did not consent to any other sexual contact.

9) She said that the transition then to intercourse was, to use her words, “random” and “fast.” She said that she was not expecting intercourse. She didn’t know what to do.

10) For his part, Andrew Zwicker denies that anything even remotely like that incident took place. This is not a situation in which the accused is asserting that there was consent. He says that they never had sex, that they did not kiss and did not even spend time alone together away from the main party.

11) The versions of events stand in stark contrast to each other.

Issue:

12) The issue is whether the Crown has proven beyond a reasonable doubt that Andrew Zwicker had sexual contact with A.E. and that she did not consent to that contact.

13) The Crown must prove both the sexual contact and the lack of consent. If the sexual contact never occurred, as asserted by the defence, the matter of consent is logically a non-issue.

Sexual Contact:

14) Andrew Zwicker gave evidence that no contact of a sexual nature took place between himself and the 14 year old girl. After considering all of the evidence, if his denial raises a reasonable doubt he must be found not guilty.

15) His evidence was a simple denial. On cross examination his evidence was found to contain some minor inconsistencies, but not inconsistencies of a kind that would undermine the basic credibility of what he had said. His version of events did not require the occurrence of a series of unfortunate coincidences. It was simply that he had gone to the party, and had no interest at all in having sexual contact with A.E.. He continued to maintain that he thought it was wrong for 19 year old to have sexual contact with a 14 year old.

16) His evidence was not consistent with what the complainant said. One of them is not telling the truth. There is no way to be more subtle about that. There is no way in which the two versions of events can be woven into a single narrative. There is no way in which a failure of memory or a misinterpretation of the facts can account for the two stories. Once again, one of them is not telling the truth.

17) Andrew Zwicker's evidence is also not consistent with the evidence of two Crown witnesses. He denied going off with the complainant to an area away from the main party at the bonfire. B.F. and C.G. told of how they had gone to that area and briefly seen the two together. Neither of those witnesses purport to have seen any sexual activity taking place. If their evidence is accepted as being reliable however, it would seriously challenge the reliability of what Andrew Zwicker had said.

18) C.G. said that she went to the area around the trailer or A frame and saw Andrew Zwicker and A.E. there. She left them alone and went back to the main party. She then went back up to the area a few minutes later and sensed that something was wrong. Her intuition told her that Andrew Zwicker had had sex with A.E.. She said that she told her boyfriend what had happened, or what she believed had happened and that he "freaked". The boyfriend later approached Andrew Zwicker to fight him.

19) When leaving the party, A.E. broke down and cried at the side of the road. That suggested once again that something had gone wrong.

20) When they returned home, she told C.G. what she said had happened. C.G. said that as the younger girl was sobering up it hit her. She told C.G. that it had happened on a truck and that she felt “trashy” about it.

21) The issue at this point is not whether the version of events told by the three young women is more believable than the version told by Andrew Zwicker. It is whether the Crown has proven beyond a reasonable doubt that sexual contact took place. Andrew Zwicker’s evidence, on it’s own, without reference to the other evidence in the trial, would raise such a doubt. It is a plain, simple, non-complicated outright denial. His evidence was not self contradictory or otherwise unbelievable. Someone hearing his evidence alone and out of the context of the trial would reach the reasonable conclusion that he was telling the truth.

22) That evidence is not considered in a vacuum however. It must be tested by the other evidence. Does Andrew Zwicker’s denial still raise a reasonable doubt when tested against the other evidence?

23) The medical evidence supports the conclusion that the complainant had sexual intercourse with someone, sometime around that evening. It does not point to Andrew Zwicker in any way.

24) All three young women who gave evidence, A.E., B.F. and C.G., provided versions of events that were generally similar but that had important differences or discrepancies.

25) According to C.G., B.F. had not gone to the area away from the party with her. B.F. on the other hand says that she was with C.G. at the time. That difference is not one involving some kind of peripheral detail that might be explained by different perceptions of what had happened. B.F. and C.G. were both able to describe what they had “seen”, even though one denies that the other was even there.

26) It is not insignificant here that both young women had some opportunity to discuss matters together and did. While each indicated that she was giving only her recollection of events, there is a reasonable inference that intentionally or not, they created a common, yet not perfectly common, narrative.

27) Their version of events also differed from that of A.E. in terms of how they perceived Andrew Zwicker behaving. The difference there is hardly one of nuance.

28) A.E. thought Andrew Zwicker was acting unremarkably or at most, quite confidently.

29) Both B.F. and C.G. testified that Andrew Zwicker was drunk and was acting in a way that suggested that he was on the hunt for sex. He was, in C.G.’s words, “all over the girls” and was acting like a “pervert” and an “idiot”. C.G. said that Andrew Zwicker had followed A.E. around. She felt that Andrew Zwicker was trying to “get with” A.E. that evening

30) B.F. told of how she had been asked for sex by Andrew Zwicker and answered in words

to the affect of “maybe later”. She said he asked her how old A.E. was. She said she was “ like... don’t you dare”. Then after that strange exchange, and without further explanation, she began “making out” with Andrew Zwicker. He had his hands down her shirt and his tongue down her throat. This was all with her consent. Despite her expressed concern that he had targeted the younger 14 year girl, B.F. seemed to have no issue with having very casual yet intimate sexual contact with Andrew Zwicker.

31) Yet, despite all of that, A.E. saw nothing unusual in how Andrew Zwicker was behaving. He was “confident”.

32) Each of these young women had been drinking. Both of the older ones were concerned and keeping a look out for the younger 14 year old, yet neither was capable of exercising enough basic judgement to know that she should not be there at all. Both seemed to suggest that Andrew Zwicker had somehow marked A.E. as a sexual target, had seen him go off from the party with her, were concerned about her safety, yet really did nothing about it.

33) Even taking into account the social environment there is something about the circumstances the leaves the sense that there is an untold or missing part of the story. B.F.’s description of Andrew Zwicker as asking for A.E.’s age, her putting off his request for sex with “maybe later”, her then being very intimate with him and her insistence that she had seen Andrew Zwicker together with the complainant, seems to be a very eager attempt to paint a picture. That same sense of unease surrounds C.G.’s evidence. Her intuitive sense that he had had sex with the 14 year complainant, her quick reporting of that to her hot tempered boyfriend

and her interest in making sure that Andrew Zwicker was charged all suggest again, an eagerness to paint a picture. Why would the two older friends leave a drunk 14 year old girl with a person who they believed had singled her out for sex? Something about that does not make sense. A.E.'s evidence likewise seems eager to paint a very clear picture. The explicitly consensual sexual contact up to a certain point, appears to be so precise that it does not fit with the context of sexual contact on the hood of a car. The picture was eagerly painted. It could well be accurate, even though all three could not be accurate. There is much about it however that leaves me with the uneasy feeling that there is an untold back story.

34) The evidence is sufficient to raise a reasonable doubt. The evidence of A.E., B.F. and C.G. may well be more reliable than that of Andrew Zwicker. It may be more likely that they, and not he, are telling a version that is closer to the truth. It may be more likely than not that the incident took place more or less as they have described it. That however, is not the issue. The issue is whether the evidence raises a reasonable doubt.

35) I cannot specifically reject their evidence as being untrue. But neither is their evidence so reliable that it should cause his evidence to be rejected as raising a reasonable doubt.

36) In almost all circumstances the analysis of the situation should end there. The Crown has not proven the sexual contact beyond a reasonable doubt. Logically, if the sexual contact has not been proven beyond a reasonable doubt, the issue of consent is not relevant. There is however something more than usually disconcerting about this situation. The issue of consent, to some extent, may still be logically relevant.

37) I have found that the evidence of the complainant should not be and cannot be rejected. It is simply not enough, along with the other evidence in the trial, to remove the doubt raised by the evidence of Andrew Zwicker. While the Crown has not proven sexual contact beyond a reasonable doubt, there remains a reasonable likelihood that A.E. is right and that something did indeed happen.

38) The issue of consent and the issue of whether sexual contact happened are in one way plainly and logically distinct from each other. If the sexual contact did not happen, logically, there could be no consent.

39) It may also be said however, that the assertion by the complainant that she did not consent bears on the issue of whether the sexual contact took place at all. First, if A.E. was so intoxicated that she could not consent, that would make her recollection and her evidence of what is alleged to have happened to be entitled to less reliability than has been given to it to this point. Second, if A.E.'s words and actions are inconsistent with her assertion that she did not consent to the sexual contact that she alleges took place, that is also a factor to be considered in determining the reliability of her evidence. That may affect the reliability of her testimony with regards to whether the sexual contact took place at all.

Consent:

40) The presence or absence of consent can then be an issue. The parties are separated in age by almost, but not quite 5 years. A 14 year old cannot give consent to sexual contact if the accused is 5 years older than she is. Here, Andrew Zwicker is not quite 5 years older. If she consented to sexual contact he would be found not guilty of the offence.

41) Andrew Zwicker has absolutely denied any sexual contact with the complainant. He has not addressed the issue of consent in his evidence. There is no defence of honest but mistaken belief. There is no evidence as to what Andrew Zwicker might have believed because he has denied any sexual contact.

42) The Crown asserts that Andrew Zwicker found himself in a compromising situation, of his own creating. At the time of his interview with the police, he was not aware that the defence of consent might have been available to him. The Crown suggests that he believed that the admission of any sexual contact with a 14 year old girl would result in his being guilty of an offence. He then felt that he had no choice but to deny any sexual contact. If he were to do a volte-face and now allege consent, his credibility would be very significantly reduced. It is difficult to say, "I lied to the police but I'm telling the truth now."

43) On this view, by lying to the police, he has made his bed and now he must lie in it. His decision, based on a misunderstanding and a willingness to lie to avoid what he thought would be the consequences, could have had disastrous repercussions for him. There may, to some, be a sense of "poetic justice" in that. He was very close to being 5 years older than the drunk 14 year old complainant. Lying to the police would have prevented him from taking advantage of a

defence that would have been perhaps only barely open to him. She was after all only barely within the 5 years and to make matters worse was drunk. That however is hardly a result that would be a reflection of a system that upholds the presumption of innocence.

44) The only evidence with respect to consent was that of the complainant. That does not resolve the issue of consent however. She gave evidence of what she said and did. She also gave evidence with respect to her subjective consent or lack of consent to sexual activity. They are two different things. Her evidence as to what she said and did may or may not be consistent with her statement as to her state of mind regarding consent.

45) The Crown must prove beyond a reasonable doubt the absence of consent. That is subjective. It is to be determined by the subjective internal state of mind of the complainant, at the time the sexual conduct occurred. The accused person's perception of her state of mind is not relevant unless the defence of honest but mistaken belief is raised. It has not been raised here. It could not be because of the denial of sexual contact.

46) The Crown asserts that the complainant was so drunk that she could not have consented to sexual contact in any event. A person cannot consent to an activity if she does not have the capacity to consent. The capacity to consent involves having an understanding of the sexual nature of the act and realizing that she could chose to decline to participate. That capacity has to be assessed having regard to the fact that she was also a 14 year old and was having sexual contact with a person almost but not quite 5 years older than she was.

47) Andrew Zwicker's evidence was that she was "plastered". Her own evidence was that she was intoxicated, "drunk but not loaded". She specifically said that while she was drunk she was not so drunk that she could not remember things. She did attribute some of her inability to recall details to the fact that she had been drinking. She was, in her words, "happy, friendly and being loud". Everyone at the party appears to have been drinking. Each of the witnesses in this matter who were there indicated that they were drinking to the point of intoxication. It is difficult to accept the evidence of an intoxicated person as to precise level of his or her own intoxication much less that of another in a social setting.

48) The only objective evidence of A.E.'s state of intoxication is that related to her own actions and behaviour that evening. She left the party with her older sister and was then able to make her way back. She was also not so drunk that she could not, on her testimony have recalled specifically consenting to kissing and the touching of her breasts and genitals by Andrew Zwicker with his hands or fingers. She also said that with regard to intercourse she stopped consenting. On her own evidence then, she was capable of deciding what she would or would not do. She was able to make that distinction. She understood the sexual nature of the act. She knew, even as a 14 year old, that what she was doing was sexual.

49) Being intoxicated, in itself, does mean that a person cannot consent. Inhibitions are reduced by alcohol, apparently even in relatively modest amounts. Judgement is affected, adversely. That reduction of inhibition and affect on judgement does not mean that valid consent cannot be given.

50) At some point, the degree of intoxication is such that the person is not capable of giving valid consent. If the person is capable of understanding the sexual nature of the act and of making the subjective distinction between what they should or should not do, even though intoxicated, he or she can give consent. *R. v. Jensen* [1996] O.J. No. 1514 (Ont. C.A.), para.16.

51) The young complainant was impaired. That much is clear. She was however, able to recall what had taken place in considerable detail. She was entirely aware of what was happening in terms of engaging in sexual conduct. Based on her evidence, she was able to make the distinction between what she wanted to do and what she did not want to do. She specifically consented to some of the sexual activity. Had she been entirely sober, she might well have decided differently. She was still capable of giving consent.

52) She said that she was capable of making the choice or the distinction. That is not conclusive evidence of the particular choice that she made.

53) The privacy screen was requested for A.E. while she gave her evidence. It was rather quickly removed. She was not a shy child witness who was intimidated by either the process or the lawyers. She was a combative and at times aggressive 16 year old. She was capable of interrupting defence counsel, correcting him, questioning him, and expressing her frustration. At points she became sarcastic and flippant. At one point she said, in apparent frustration, that she wanted to leave and didn't want to finish giving her evidence. The manner of questioning was not such that one could in any way conclude that she was being bullied.

54) The issue at this point is whether her evidence establishes that she did not consent to sexual intercourse. That is not based on an objective analysis of her words and behaviour to determine whether a reasonable person would conclude that she had consented. The issue is not whether Andrew Zwicker believed that she had consented. It is whether she subjectively consented to the specific act of sexual intercourse. The surrounding circumstances are relevant to the determination of whether her assertion that she did not consent is an accurate reflection of her own state of mind at the time.

55) A person may consent to do something, out of a sense of obligation, pity, social pressure, or habit. There may be reservations, regrets, resentment, feelings of guilt or doubt or generally a less than wholehearted commitment to the activity. The issue is particularly complicated when sexual relationships are involved. The activity may involve hope for a long term relationship, physical desire or emotional connection. Yet another layer of complexity is added when the person involved is both young and drunk.

56) In the mind of the young participant in the activity there may sometimes be swirling around, the desire to engage in sexual activity, some doubt as to whether he or she should and some regret that things have gone as far as they have. Regret and consent are not mutually exclusive. One can consent to activity, while at the same time harbouring some doubt or regret. The issue is whether consent is subjectively present. Consent is either present or it is not. It is an either/or decision. Just because it is an either/or decision does not mean that it's a clear or by any means easy one.

57) A.E.'s evidence was that Andrew Zwicker kissed her. She consented. She kissed him. He asked how old she was or when her birthday was. She told him. He asked if he could touch her breasts. She consented. He asked if he could "finger" her, by which she meant touch her vagina with his hand. She consented. There is something strange about sexual activity that is so explicitly and precisely consensual. Yet, he did not, on her evidence, ask if he could take the sexual contact further. Her evidence is that she did not want to go any further but was confused and shocked. Her evidence is at best equivocal as to the extent to which she expressed any such unwillingness.

58) She told police that when she was placed on the car she was not looking to see Andrew Zwicker take his pants down. She was looking over at the others and "like eh-hh." She was asked about the response. She said: "It was a shitty response". There was some questioning as to the intonation and intent of that non-verbal vocalized sound. The evidence is however that she was looking to the others, could see them, and made no gesture or audible comment to indicate that she wanted to stop.

59) She was, she said, "wondering the hell why no one was around." She could see people around the fire and wondered " why the fuck no one was coming".

60) She gave evidence that she may or may not have said something but not loud enough for Andrew Zwicker, much less anyone else, to have heard. She also testified that she said something, but didn't know what it was that she had said. In her police statement she told the police that she may have said "stop" or something like that but not loud enough for him to hear.

Given that they were within the most intimate of distances, any words or sounds made that he would not have heard would have to have been very faint. The evidence is that she specifically consented to very intimate sexual touching and said nothing audible or did nothing as the activity reached the stage of intercourse.

61) Consent cannot be “implied”. The issue can never be removed from the state of mind of the complainant. The determination of whether she subjectively consented requires that an inference be made from the evidence. Her statement in court that she did not consent is part of that evidence. The other evidence must also be considered to determine her actual state of mind at the time.

62) Agreement to be involved in some level of sexual touching is not sufficient to establish consent to intercourse. It is however evidence of the context. The context here involves sexual activity taking place in what the complainant believed was in view of the assembled group. She wondered why no one was coming. When it reached a point where she says she stopped consenting, she did nothing, and said nothing loud enough even for accused to have heard, much less anyone else. She did not signal her withdrawal of consent in any way, verbally or physically. She is not obligated to fight back to establish a lack of consent but she gave no physical signal of any kind to indicate her lack of willingness to proceed. This was not taking place in a secluded area. They were not far away from people who had concerns about her safety around Andrew Zwicker.

63) The complainant's actions, at the time, are not consistent with her stated subjective lack of consent. Her actions are more consistent with subjective regret, realized and articulated afterward, about what had just happened. It is reasonable to infer that after some time to reflect, even a few minutes, she regretted what had happened. She had consented to very intimate sexual contact. As it progressed she was not assessing her level of comfort with each aspect of the interaction. As the activity quickly and "randomly" became more intense she may have briefly questioned in her own mind whether she should keep going, but she appears to have deferred the answer. If she had indeed answered her own question and had wanted to stop, she knew that she could do that by saying the word loud enough for him to hear. If, as she says, he had asked for permission to touch her, it would be reasonable to assume that saying the word "no" would have meant something to him, particularly given where this was taking place. She did not have to scream or fight him off. "No", of course, means "no". It is the sign that subjective consent has been withdrawn. Her actions here are more consistent with her ongoing consent than with her having withdrawn consent.

64) The aftermath of the situation is also consistent with that inference. On her evidence, she told no one, at the time. She remained at the party. She called her friend, D.H. and told him that something had happened between herself and Andrew Zwicker. He told his mother, who then met with her and helped her make arrangements to get medical attention.

65) As the matter became more talked about, it is reasonable to infer that it took on a life and a momentum of its own. The fact that she sought that kind of medical assistance and went through the difficult process involved is consistent with sexual assault. It is equally consistent

with it being a way to reinterpret her later reservations as lack of consent at the time. The complainant told her friend that she felt “trashy” about what had happened. It is not surprising that there would be regret and embarrassment about a first sexual relationship in circumstances that were not tender, romantic or special in any way. That is particularly so when those circumstances had rather quickly become known within her social group, had become the subject of comment through social networking sites and had otherwise “gone viral” through the small community.

66) I do not accept that the complainant’s evidence establishes beyond a reasonable doubt that she did not consent to intercourse. Her evidence of what she said and did, is not consistent with her evidence that she did not consent to intercourse.

67) There is a reasonable doubt that sexual contact took place between the complainant and Andrew Zwicker. I have already set out why I have made that finding. The level of reasonable doubt is heightened by the inconsistency between the complainant’s statement of what she said and did and her assertion that she did not consent to intercourse. This adds another troubling aspect to a matter that suggests that there remains an untold part of the story.

68) I find Andrew Zwicker not guilty.

J