

Her Majesty the Queen v. Cornejo
[Indexed as: R. v. Cornejo]

68 O.R. (3d) 117
[2003] O.J. No. 4517
Docket No. C37199

Court of Appeal for Ontario
Catzman, Abella and Gillese JJ.A.
November 27, 2003

***Application for leave to appeal to the Supreme Court of
Canada was dismissed October 7, 2004 (Major, Binnie and Fish
JJ.)**

Criminal law -- Sexual assault -- Defences -- Honest belief in consent -- Accused charged with sexual assault -- Complainant testifying that she was intoxicated and awoke on her couch to find accused trying to penetrate her -- Complainant had previously rebuffed accused's sexual advances -- Trial judge erring in leaving defence of honest belief in consent with jury on basis that accused's claim that complainant raised her pelvis to assist him in removing her clothing satisfied air of reality threshold -- Accused's failure to take reasonable steps to ascertain consent barring defence of honest belief in consent in circumstances of this case -- [Criminal Code, R.S.C. 1985, c. C-46, s. 273.2\(b\)](#).

The accused was charged with sexually assaulting a co-worker and with breaking and entering a dwelling house and committing the offence of sexual assault. He had made sexual advances to the complainant in the past and had been rebuffed. On the day of the alleged offence, he and the complainant had attended a company golf tournament. They did not speak to each other at the tournament and left separately. The accused testified that he called the complainant at home several times late that night, that she sounded as if she had been sleeping, and that she initially told him that she was waiting for her boyfriend to call. He said that she later told him that her boyfriend was not coming over and responded with an affirmative noise when he asked her if he could come over. He testified that he entered the complainant's apartment through an unlocked door, found the complainant sleeping on the couch, and started touching and kissing her. She said, "What the hell are you doing here?" and stopped him when he tried to kiss her on the mouth. His evidence was that she did not touch him in return and remained lying on the couch with her eyes closed throughout the encounter, but that she lifted her pelvis when he tried to remove her jeans and underwear. When he tried to position the complainant for intercourse, she said "no". He said, "I thought that you wanted it" and she told him to get out. The complainant claimed that she was very drunk after the tournament and fell asleep on her couch, and that she awoke to find the accused on top of her, naked and attempting to penetrate her. She tried to push him off and was explicit in asserting that she did not consent to the sexual activity. The trial judge left the defence of honest belief in consent with the jury. He relied solely on the complainant's pelvic movements as evidence satisfying the air of reality threshold. The accused was acquitted. The Crown appealed.

Held, the appeal should be allowed.

The trial judge erred in concluding that the movements of the complainant's pelvis were a sufficient evidentiary basis to allow the defence of honest belief in consent to go to the jury. The lifting of her pelvis by a woman who has been drinking, is asleep and, as the accused knew, is totally uninterested in any kind of intimate relationship, cannot give rise to an assumption that the woman is consenting to sexual activity. Other than the accused's assertion that he believed the complainant was consenting and the movement of her pelvis (significantly, after he had already initiated the sexual activity), there was overwhelming evidence that she either did not consent or was incapable of consenting. The accused took advantage of a passive and unclear response. [Section 273.2\(b\)](#) of the [Criminal Code](#) provides that it is not a defence to a charge of sexual assault that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge where "the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting." The legislative scheme

replaces the assumptions traditionally, and inappropriately, associated with passivity and silence. A person in the accused's circumstances takes a serious risk by founding an assumption of consent on passivity and non-verbal responses as justification for assuming that consent exists. The circumstances of this case called for the accused to take reasonable steps to ascertain consent. As he took no steps, [s. 273.2\(b\)](#) statutorily barred the defence.

APPEAL by the Crown from an acquittal on charges of sexual assault and breaking and entering a dwelling house and committing the offence of sexual assault.

Cases referred to R. v. Cinous, [2002] 2 S.C.R. 3, [2002 SCC 29 \(CanLII\)](#), 210 D.L.R. (4th) 64, 285 N.R. 1, 162 C.C.C. (3d) 129, 49 C.R. (5th) 209, [2002] S.C.J. No. 28 (QL); R. v. Darrach, [2000 SCC 46 \(CanLII\)](#), [2000] 2 S.C.R. 443, 49 O.R. (3d) 735n, 191 D.L.R. (4th) 539, 259 N.R. 336, 78 C.R.R. (2d) 53, 148 C.C.C. (3d) 97, 36 C.R. (5th) 223, affg (1998), [1998 CanLII 1648 \(ON CA\)](#), 38 O.R. (3d) 1, 49 C.R.R. (2d) 189, 122 C.C.C. (3d) 225, 13 C.R. (5th) 283 (C.A.), affg (1994), 17 O.R. (3d) 481, 28 C.R. (4th) 201 (Prov. Div.) (sub nom. R. v. D. (A.S.)); R. v. Ewanchuk, [1999 CanLII 711 \(SCC\)](#), [1999] 1 S.C.R. 330, 68 Alta. L.R. (3d) 1, 169 D.L.R. (4th) 193, 235 N.R. 323, [1999] 6 W.W.R. 333, 131 C.C.C. (3d) 481, 22 C.R. (5th) 1; R. v. G. (R.) (1994), [1994 CanLII 8752 \(BC CA\)](#), 38 C.R. (4th) 123, [1994] B.C.J. No. 3094 (QL), 53 B.C.A.C. 254 (C.A.); R. v. Livermore, [1995 CanLII 43 \(SCC\)](#), [1995] 4 S.C.R. 123, 26 O.R. (3d) 96n, 129 D.L.R. (4th) 676, 189 N.R. 126, 102 C.C.C. (3d) 212, 43 C.R. (4th) 1 Statutes referred to [Criminal Code, R.S.C. 1985, c. C-46, ss. 271\(1\), 273.2, 348\(1\)](#) (b) Authorities referred to Roach, K., Criminal Law, 2nd ed. (Toronto: Irwin Law, 2000) Stuart, D., Canadian Criminal Law, 4th ed. (Scarborough: Carswell, 2001)

Susan Chapman, for appellant.

Terry S. Guerriero, for respondent.

The judgment of the court was delivered by

[1] ABELLA J.A.: -- Luis Cornejo was charged with one count of sexual assault, contrary to [s. 271\(1\)](#) of the [Criminal Code, R.S.C. 1985, c. C-46](#) and one count of breaking and entering a dwelling house and committing the offence of sexual assault, contrary to [s. 348\(1\)\(b\)](#) of the [Criminal Code](#). He was tried before a jury and acquitted on both counts.

[2] This is an appeal by the Crown from those acquittals on the basis of the trial judge's alleged error in leaving the defence of honest but mistaken belief in consent for the jury's consideration when there was no air of reality to that defence.

[3] For the reasons that follow, I agree with the Crown's submission.

Background

[4] The complainant and Luis Cornejo were co-workers. They appear to have had a moderately friendly casual relationship which included bantering with a sexual aspect. On one occasion, Mr. Cornejo tried to grab the complainant's buttocks and she slapped his hand away. On another, the complainant had said "no" to Mr. Cornejo's suggestion that they have a sexual relationship. Mr. Cornejo had also tried to kiss the complainant at the company Christmas party, but she indicated to him at that time that she did not want this kind of conduct to take place. The day after the party, Mr. Cornejo apologized for his behaviour.

[5] On the day of the events that gave rise to these charges took place, both the complainant and Mr. Cornejo were at a company golf tournament. They did not speak to each other at the tournament and left separately. They had both been drinking.

[6] Mr. Cornejo testified that he called the complainant at home at about 12:30 a.m. and that she sounded as if she had been sleeping. He spoke to her very briefly, during which time she told him she wanted to get off the telephone because she was expecting a telephone call from her boyfriend. Several minutes later, Mr. Cornejo called the complainant again and was informed that her boyfriend had not called so she needed the line to call her boyfriend. Mr. Cornejo called a third time, and asked what had occurred between the complainant and her boyfriend. The complainant told him that her boyfriend was not coming over. Mr. Cornejo said he asked if he could come over, and the complainant's response, according to the transcript, was "mm-hmm". Mr. Cornejo testified that he took this to be an affirmative response to his request.

[7] He arrived at the complainant's apartment at about 1:30 a.m. When he got no response after knocking on her door, he tried the door, found it unlocked and entered the apartment. The complainant had left the door unlocked for her boyfriend. The complainant was sleeping on her couch. Mr. Cornejo testified that he said "hello" to the complainant, at which point the complainant woke up and asked "What the hell are you doing here?" He then sat beside her on the couch, ran his fingers through her hair, and kissed her on the forehead and on her mouth. He testified that she put her finger on his mouth and said "no, not on the mouth". He asked "why not" and she responded "because I don't love you". He then began kissing her on the neck and removed the blanket that was covering her.

[8] His evidence was that she did not touch him in return, and that she remained lying on the couch with her eyes closed throughout the entire encounter. Mr. Cornejo said that when he tried to take her jeans off, she lifted her pelvis. Shortly thereafter, he took her underwear off and indicated that once again she had lifted her pelvis. When he tried to position the complainant for intercourse, she said "no". Mr. Cornejo sat up and said "I thought that you wanted it". She told him to get out. He then noticed he had blood on his hand and asked her if she had her period. She did not respond. He went to the washroom. She told him that she wanted him to leave, at which point he left.

[9] According to the complainant, although she rarely drank, on the day of the golf tournament she drank nine beers and was very drunk. She fell asleep on her couch at home and awoke to find Mr. Cornejo on top of her, naked and attempting to penetrate her. Her underwear and pants had been removed. She tried unsuccessfully to push him off and asked him repeatedly what he was doing. She was explicit in asserting that she did not consent to the sexual activity. She does not remember any of the facts that Mr. Cornejo relies on, and has no memory of him entering the apartment or telephoning her that night. She was wearing a tampon when Mr. Cornejo attempted to penetrate her.

[10] When ruling on whether the air of reality threshold was met, the trial judge relied solely on the pelvic movements of the complainant as evidence satisfying the air of reality threshold:

And with respect to the summation of the decision in EWANCHUK, it states that a belief that one, silence; two, facility; or three, ambiguous conduct constitutes consent is not the defence.

It would seem to me that, if the accused's testimony is believed, there is conduct on the complainant's part that goes beyond any of those three listed items, and would constitute unambiguous consent and that is co-operation in the removal of clothing. And that I take to be the gist of part of the accused's testimony.

Therefore, I think that there is sufficient evidence to permit this defence to go to the jury.

[11] With respect, I believe that the trial judge erred in concluding in these circumstances that the movements of the complainant's pelvis were a sufficient evidentiary basis to allow the defence to go to the jury.

Analysis

[12] In *R. v. Cinous*, [2002] 2 S.C.R. 3, [2002 SCC 29 \(CanLII\)](#), the Supreme Court of Canada discussed the air of reality test, albeit not in the context of a sexual assault. This judgment confirmed that a trial judge has a duty to keep from the jury any defences lacking an evidentiary foundation or an air of reality. As explained by McLachlin C.J.C. at p. 29 S.C.R., the "test is whether there is evidence on the record upon which a properly instructed jury acting reasonably could acquit". Further, the trial judge must consider the "totality of the evidence" and assume the evidence relied upon by the accused to be true.

[13] In *R. v. Livermore*, [1995 CanLII 43 \(SCC\)](#), [1995] 4 S.C.R. 123, 129 D.L.R. (4th) 676, at p. 135 S.C.R., McLachlin J. explained that the defence of honest but mistaken belief in consent "involves two elements: (1) that the accused honestly believed the complainant consented; and (2) that the accused have been mistaken in this belief" (original emphasis).

[14] In *R. v. Ewanchuk*, [1999 CanLII 711 \(SCC\)](#), [1999] 1 S.C.R. 330, 169 D.L.R. (4th) 193, at pp. 354-55 S.C.R., Major J. stated:

In order to cloak the accused's action in moral innocence, the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question. A belief by the accused that the complainant in her own mind, wanted him to touch her, but did not express desire, is not a defence . . . What matters is whether the accused believed that the complainant effectively said "yes" through words and/or actions.

(Original emphasis)

He also observed, at p. 356 S.C.R., that "belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and provides no defence".

[15] In my view, based on Mr. Cornejo's own testimony, the evidence points to an absence of consent on the complainant's part and a giant leap of imagination on his. The lifting of her pelvis by a woman who has been drinking, is asleep, and, as Mr. Cornejo well knew, is totally uninterested in any kind of intimate relationship, cannot give rise to an assumption that the woman is consenting to sexual activity. In these circumstances, I cannot, with respect, see any air of reality to Mr. Cornejo's assertion that he honestly believed the complainant was consenting to his presence in her apartment, let alone to the sexual activity he engaged in with her there.

[16] In these circumstances, other than Mr. Cornejo's assertion that he believed the complainant was consenting and the movement of her pelvis significantly after he had already initiated the sexual activity, there was overwhelming evidence that she either did not consent or was incapable of consenting. Mr. Cornejo took advantage of a passive and unclear response.

[17] During his testimony, Mr. Cornejo explained that the complainant's eyes were closed while he was kissing her and while he removed her clothing, and admitted that it was possible that she was asleep during the encounter. He testified that when she said "no", she suddenly seemed very awake and there was a big difference in the way she was acting.

[18] The facts do not provide an evidentiary foundation for the assertion that when Mr. Cornejo commenced sexual activity with the complainant, he believed she was consenting. After entering a person's home, late at night without permission, an individual cannot commence sexual activity with a person who has been drinking and was asleep, and then rely on the mistake defence solely on the basis that at one point late in the encounter, the woman moved her body. The trial judge failed to make reference to any facts other than the movement of the complainant's body after the sexual activity had begun. In these circumstances, the movement of the complainant's pelvis was simply an insufficient basis to allow the defence to go [to] the jury.

[19] These circumstances called for Mr. Cornejo to take reasonable steps to ascertain consent, and as he took no steps, s. 273.2(b) statutorily bars the defence. As explained by Don Stuart in *Canadian Criminal Law*, 4th ed. (Scarborough: Carswell, 2001) at p. 295:

The accused still has to pass the air of reality test for a mistake of defence . . . He now will never have the defence open where his mistaken belief arose from self-induced intoxication, recklessness or wilful blindness, or, more importantly, where he did not take reasonable steps in the circumstances known to him to ascertain that the complainant was consenting.

Therefore, given Mr. Cornejo's failure to take any steps, in the words of McLachlin C.J.C. in *Cinous*, at p. 31 S.C.R., there was no "real issue" for the jury to decide.

[20] The relevant sections of the [Criminal Code](#) are as follows:

273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

(a) the accused's belief arose from the accused's

(i) self-induced intoxication, or

(ii) reckless or wilful blindness; or

(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting. 1992, c. 38, s. 1

[21] The purpose of these provisions is to ensure that there is clarity on the part of the participants to the consent of the other partner to sexual activity. The legislative scheme replaces the assumptions traditionally -- and inappropriately -- associated with passivity and silence. Someone in Mr. Cornejo's circumstances takes a serious risk by founding an assumption of consent on passivity and non-verbal responses as justification for assuming that consent exists.

[22] The requirement to provide evidence of reasonable steps being taken is explained by Professor Kent Roach in *Criminal Law*, 2nd ed. (Toronto: Irwin Law, 2000) at pp. 157-58 as follows:

The denial in section 273.2(b) of the mistake of fact unless the accused takes reasonable steps in the circumstances known to him at the time to ascertain whether the complainant was consenting to the activity in question combines subjective and objective fault elements in a novel and creative manner . . . The accused's obligation to take reasonable steps is only based on what he subjectively knows at the time. On the other hand, section 273.2(b) requires the accused to act as a reasonable person would in the circumstances by taking reasonable steps to ascertain whether the complainant was consenting. Much will depend on the Courts' view of what reasonable steps are necessary to ascertain consent. Some judges may find that positive steps are required in most, if not all, situations regardless of the accused's subjective perception of the circumstances. Others may only require such steps if the complainant has indicated resistance or lack of consent in some way that is subjectively known to the accused.

(Emphasis added)

[23] Wood J.A., in *R. v. G. (R.)* (1994), [1994 CanLII 8752 \(BC CA\)](#), 38 C.R. (4th) 123, [1994] B.C.J. No. 3094 (QL) (C.A.) stated [at p. 130 C.R.]:

[Section] 273.2(b) clearly creates a proportionate relationship between what will be required in the way of reasonable steps by an accused to ascertain that the complainant was consenting and 'the circumstances known to him' at the time.

[24] What are the circumstances known to Mr. Cornejo?

[25] The complainant and Mr. Cornejo were co-workers. The complainant had never given Mr. Cornejo any indication that she was interested in a sexual relationship with him. In fact, as Mr. Cornejo testified, whenever he raised the possibility of a sexual relationship with the complainant, she explicitly rejected it.

[26] They did not speak at the golf tournament that day, and she had given him no indication that she was interested in seeing him, let alone engaging in sexual activity with him.

[27] On the night in question, Mr. Cornejo telephoned the complainant three times after midnight. Knowing that the complainant had been waiting for her boyfriend to visit her, Mr. Cornejo decided to drive to her apartment on the strength of what can only be described as an ambiguous groan on her part. When he arrived, he knocked on the door and she did not answer.

[28] Mr. Cornejo testified that he had no right to enter her apartment that night and that the complainant was sound asleep when he arrived. When he awoke the complainant, she asked, "What the hell are you doing here", an unambiguous comment and a clear reflection that she had not agreed to his coming to her apartment.

[29] The only words Mr. Cornejo said the complainant expressed were "what the hell are you doing here", "no, not on the mouth", and "because I don't love you". Either in isolation or taken together, these are phrases of rejection. They are not ambiguous. It is hard to see how these statements could be interpreted as enticement entitling Mr. Cornejo to assume that he could proceed with his sexual activity.

[30] These were circumstances crying out for reasonable steps to ascertain consent. The complainant's prior rejections of his sexual advances, his apology to her in the past for his inappropriate sexual advances, her request to him that he hang up during the first two telephone calls so she could speak to her boyfriend, her ambiguous response to his third phone call, her failure to answer the door, his entering the apartment without permission and finding the complainant sleeping and shocked by his presence, all required that he take reasonable steps to clarify whether she was consenting to sexual activity. She never touched him, her eyes were closed, he knew she had been drinking that day, and every rejection by her that evening, even according to his own evidence, resulted in more aggressive sexual conduct on his part.

[31] Mr. Cornejo's counsel pointed to the following as reasonable steps taken to ascertain consent: he ran his fingers through her hair; he kissed her on the forehead; he kissed her on the mouth; the complainant lifted her pelvis when he removed her clothing.

[32] But this is a submission that permits Mr. Cornejo to transform his own acts into reflections of consent. In these circumstances, Mr. Cornejo ought to have taken steps before he engaged in any sexual activity to ascertain whether she was consenting. In *R. v. Darrach* (1998), [1998 CanLII 1648 \(ON CA\)](#), 38 O.R. (3d) 1, 122 C.C.C. (3d) 225 (C.A.), aff'd [2000 SCC 46 \(CanLII\)](#), [2002] 2 S.C.R. 443, 191 D.L.R. (4th) 539, Morden A.C.J.O. explained, at para. 90 [p. 25 O.R.] that s. 273.2(b) requires that "a person about to engage in sexual activity take 'reasonable steps . . . to ascertain that the complainant was consenting'." In my view, no steps of any kind, let alone reasonable ones, were taken.

[33] On the basis of Mr. Cornejo's own evidence, the complainant said no and physically stopped him from kissing her on the mouth. This could not be interpreted as a reasonable step in ascertaining consent to sexual activity or as providing him with confidence that he had thus secured her consent to proceed further.

[34] Any reasonable person in Mr. Cornejo's position, who was aware of these same circumstances, would have taken further steps to ascertain consent before proceeding with sexual activity. No reasonable person, on the other hand, when being told that someone was uninterested in being kissed because she did not love him, would assume that she would, in the alternative, be interested in having her clothes removed and engaging in sexual intercourse.

[35] As a result, the trial judge erred in leaving the defence of honest but mistaken belief in consent with the jury.

Conclusion

[36] Accordingly, I would allow the appeal, set aside the acquittals and direct a new trial.

Appeal allowed