

Case Name:

R. v. R.R.

**Between
Her Majesty the Queen, and
R.R. (a young person)**

[2014] O.J. No. 959

2014 ONCJ 96

Court File No. 13-1005Y

Ontario Court of Justice

R.H.K. Schwarzl J.

Heard: January 28 and 31, 2014.

Judgment: February 25, 2014.

(17 paras.)

Counsel:

Ms. Seeta Scully for the Crown.

Ms. Jordana Goldlist for the Accused.

R.H.K. SCHWARZL J.:--

1.0: INTRODUCTION

1 In May 2013 the Accused, R.R., was 17 years old. At that time he became involved in a relationship with a female neighbour, M.P., who was only 12. During the relevant time, the two children engaged in repeated acts of consensual sexual intercourse. Following the discovery of the details of this illicit activity, the Accused was charged with Sexual Assault and with Sexual Interference.

2 The sole issue is whether the Accused took all reasonable steps to ascertain the complainant's age pursuant to section 150.1(4) of the *Criminal Code*. The defence submits that the totality of the evidence discloses an air of reality to the Accused's claim that he complied with his legal obliga-

tions to ascertain M.P.'s age before engaging in sexual activity with her. They further submit that the Crown has failed to disprove this issue beyond a reasonable doubt. The Crown takes positions contrary to those argued by the defence.

2.0: RELEVANT EVIDENCE

2.1: The Complainant, M.P.

3 M.P. gave some evidence that she believed the Accused knew she was twelve. Having said that, she did not recall ever speaking with him about her age despite having daily and frequent communications on a wide variety of topics. She testified that the Accused never asked her what school she went to, but assumed that he knew. She testified that she was in middle school and that she knew the Accused was in high school because he was a friend of her 17 year old brother, although the Accused went to a high school different from her brother.

4 M.P. said at first that the Accused never asked her age at any relevant time. The first time that M.P.'s age was directly stated to the Accused was by her mother who, after hearing that he was dating her daughter, told him that M.P. was only twelve. This happened shortly after a neighbour, Ms. Sousa, had caught them kissing. Immediately after being told her true age, the Accused broke up with M.P. and there was no more sexual contact between them, despite her texts asking for it. In a number of texts filed as evidence, it is clear that the Accused was concerned about people learning that they had sex. What is unclear is whether his concern arose from his prior knowledge of her true age or that it arose from his subsequent knowledge and the neighbourhood's possible reaction to the scandal. In the texts R.R. accused the complainant of being a liar. M.P. testified that he said this to her after he found out that she had lied about her age.

5 Prior to the Accused being made aware of M.P.'s actual age, the complainant posted a number of photos on her Facebook page. She agreed that she was trying to look alluring and older than she really was in order to appear attractive to the Accused. She hung around with girls of all ages in the neighbourhood including some who were 15 and 16 years old.

6 The complainant testified that after their last sexual encounter, but before M.P.'s mother disclosed her actual age, the Accused apologized to her because he knew they weren't supposed to do it and because she was underage. She qualified this evidence by stating that she merely assumed he apologized because of her age but did not know this for a fact.

7 When confronted in cross-examination that she told the Accused she was 16 and that she went to the same high school as her older brother, the complainant initially denied having said these things but later conceded that she may have and had forgotten that she did. In re-examination, M.P. said that she lied to the Accused about her age.

2.2: The Accused, R.R.

8 The Accused testified that he met M.P. through her brother, who is the same age as the Accused. He accepted her invitation to become friends on Facebook where she had posted "sexy" pictures of herself. The Accused believed she was 16 because M.P. hung around with two 16 year girls in the neighbourhood. M.P. was also friends with his 15 year old sister. The Accused noticed that M.P. was often out late at night, much later than a younger girl would be. He said that M.P. dressed and behaved like a 16 year old, including wearing makeup. He didn't know what school she attended, but figured that given all the circumstances he was aware of that she was in Grade 11, or one year behind her brother.

9 R.R. also testified that prior to any sexual activity he asked her point-blank how old she was and that she said she was 16. He said that he had no reason to doubt her word until M.P.'s mother revealed her true age. It was at that point that he stopped any sexual relationship with M.P. because he felt both bad and weird. He apologized to her for having sex with her once he found out that she was only 12. Later, he sent hurtful texts to her because he was angry and upset that she had lied about her age. He also rebuffed her texts asking for more sex with him.

10 The Accused denied being caught kissing M.P. by a neighbour. He agreed that he knew M.P.'s brother wore a uniform at his high school because he would sometimes see him right after school. However, he never saw M.P. right after school and never saw her in a school uniform.

3.0: APPLICABLE LEGAL PRINCIPLES

11 Section 150.1(4) of the *Criminal Code* places an evidentiary burden on a defendant to show he took all reasonable steps to ascertain the complainant's age. The section requires more than a mistaken but honest belief as to age. It also requires the defendant to make earnest and reasonable inquiries or otherwise to be aware of compelling factors that obviate such inquiries. However, where he has exercised due diligence and points to evidence that, if true, would lead to an acquittal, it is up to the prosecution to prove beyond a reasonable doubt that he did not take all reasonable steps: *R. v. Osborne*, [1992] N.J. No. 312 (C.A.).

12 The steps the defendant is required to take will depend on all of the circumstances of the case. In some cases, such steps can be as limited as simple observations of the complainant: *R. v. Hayes*, [1991] A.J. No. 1232 (Q.B.); *R. v. L.T.P.* (1997), 113 C.C.C. (3d) 42 (B.C. C.A.); *R. v. Sinclair*, [2013] A.J. No. 1433 (Q.B.). Other case will demand further steps, but in all cases the issue will depend on what the defendant reasonably knew, not what he should have known: *R. v. Darrach* (1998), 122 C.C.C. (3d) 225 (Ont. C.A.); *R. v. Duran*, [2013] O.J. No. 2388 (C.A.). There is no particular step the defendant must make and the defendant does not have to take all possible steps in order to have acted reasonably: *R. v. Dunchie*, [2007] O.J. No. 4934 (C.A.) at para 14.

13 The court must consider all the evidence including the defendant's observations of the complainant; the complainant's appearance and behaviour; the information the complainant gave to the defendant, including information about her age; and the age differential between them: *R. v. Duran*, *supra* at para. 53.

4.0: ANALYSIS

14 Taking the evidence as a whole, including all of the contradictions contained in the testimony of both principal witnesses, I find that the Accused took reasonable steps to ascertain M.P.'s age before engaging in sexual activity with her. Although I do not believe his denial of being caught kissing, I found the balance of the Accused's evidence credible and reliable, or at a minimum was evidence that could reasonably be true. Furthermore, the evidence of the complainant is largely consistent with that of R.R. on the essential points.

15 I take into account the following circumstances. The Accused said that he asked the complainant how old she was and she replied she was 16. M.P. admitted that she may well have said this. She lied to the Accused at some point about her age. The complainant portrayed herself as older than she really was. She wore makeup. She dressed older. She frequently stayed out late. She posted pictures of herself on Facebook designed to make her look sexually mature. She hung around with girls who were known by both of them to be 15 and 16. While there is more than four years age dif-

ference between them, the complainant appeared in her video statement given at the time of the events and later in court to be a girl who looked older than she really was. M.P.'s text messages reveal a vocabulary and imagery concerning sexual matters similar to that of a much older girl. Lastly, the behaviour of the Accused after he discovered M.P.'s true age was consistent with his belief at the relevant time that she was of legal age. When told she was twelve, he immediately terminated their relationship despite M.P.'s desire to continue it and was upset that she had lied about her age.

16 For these brief reasons, I am satisfied that there was an air of reality to the Accused's belief that M.P. was much older than she really was. Furthermore, I am not satisfied that the Crown has proven beyond a reasonable doubt that the Accused failed to meet his obligations under section 150.1(4) of the *Criminal Code*.

5.0: CONCLUSIONS

17 Having considered all of the relevant evidence, the applicable legal principles, and the helpful submissions of counsel, I must acquit the Accused of both counts. My verdicts are therefore as follows:

Count #1 - Sexual Assault: Not guilty.

Count #2 - Sexual Interference: Not guilty.

R.H.K. SCHWARZL J.

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