

DATE: 20190626

BETWEEN:

– and –

Anibal Rivera

Defendant

Isabelle Blanchard, counsel for the Crown

Don Johnson, counsel for the Defendant

HEARD: May 2, 2019

REASONS FOR JUDGMENT

CHAMPAGNE, J.

- [1] Mr. Rivera is charged with one count of sexual assault on the complainant C.M. a woman whom he met through the web application “Plenty of Fish”.
- [2] Mr. Rivera and the complainant agreed to meet at the complainant’s home for a sexual encounter. It is undisputed that the complainant set out two conditions to the encounter. First, a condom was a must as it was her form of birth control and second, “no means no”.
- [3] There is no dispute Mr. Rivera and the complainant had oral sex and intercourse without a condom. The issue is whether the complainant consented.

Evidence

- [4] The complainant and Mr. Rivera both testified.
- [5] Mr. Rivera lives in Valleyfield, Quebec and the complainant lives in Cornwall. There is no dispute that the complainant and Mr. Rivera were strangers who communicated through “Plenty of Fish” and sometime between October 18th and 20th 2017, arranged for a sexual encounter to take place at the complainant’s home on October 22, 2017. At 10:44 am on October 22nd, 2017 the complainant texted Mr. Rivera that she had two rules: condoms were a must and “no means no”. Mr. Rivera texted that he was “totally Ok with that”. He also

texted her that he had never had any illnesses and was totally clean. The complainant indicated that she too was clean but that condoms were her form of birth control. The complainant also asked Mr. Rivera what she should have on hand for breakfast.

- [6] The pair arranged for Mr. Rivera to attend at the complainant's home at about 10:00 p.m. that night and he did. The complainant and Mr. Rivera both describe how he arrived. He texted her when he arrived and the complainant met him at the door and took him upstairs where he kissed and touched her with her consent. They went into the bedroom, removed their clothing and engaged in foreplay on the bed which was also consensual. It is at this point that the accounts of the complainant and Mr. Rivera become divergent.
- [7] The complainant's evidence about the sexual activity which took place after foreplay described a very different encounter than Mr. Rivera's evidence. Her testimony was that she consented to the kissing and fondling at the door and to foreplay and when came time for intercourse to take place, she told Mr. Rivera she needed him to wear a condom. She testified he told her "it will be OK, I'm clean. I'm clean". Her evidence was that she reiterated that condoms were her form of birth control and he proceeded to penetrate her vagina with his penis without a condom. She testified she froze at this point and did not participate in the sexual activity and "laid there limp". She told the court Mr. Rivera then moved up toward her head on his knees and told her he wanted oral sex. Her testimony was that she told him she "did not want to" and he grabbed her hair forcing her to his penis and pushing her head toward his penis. He put his penis in her mouth and she started to cry. She testified this lasted a few minutes and her throat became painful. She said Mr. Rivera then proceeded to have intercourse with her again. She testified she again told Mr. Rivera she needed him to wear a condom and he said "It's OK" and penetrated her vaginally and anally. She described herself as "lying there limp". Her evidence was that Mr. Rivera ejaculated on the complainant's inner thigh outside of her vagina and on a towel she had beneath her. Her evidence was that afterward, they made small talk on her bed. She felt shaken and upset but had stopped crying and about 10 minutes later, Mr. Rivera left. She explained she made small talk because she was afraid Mr. Rivera would try again.
- [8] The complainant testified that the following day she went to an appointment with her counsellor and had a discussion about the encounter that lead her to go to the hospital to have a sexual assault kit and STI and pregnancy tests performed. She took a few days afterward to decide what to do and on October 26 2017, she made a complaint to the police.
- [9] In cross-examination, the complainant refuted Mr. Rivera's version of events. She explained that the towel she had beneath her when intercourse took place was placed there by her as she ejaculates and it could get messy. She testified she could not recall if she told Mr. Rivera she had condoms or if Mr. Rivera had told her he had condoms. She could also not recall if Mr. Rivera was wearing a jacket or what she was wearing on the night of the encounter.
- [10] Mr. Rivera's evidence was that he was aware of the complainant's two rules and had agreed to them. He said he had brought condoms with him. He testified that once he and the complainant engaged in foreplay he got on his knees and put his penis near her face and she

performed oral sex. He indicated there was no conversation about whether or not she agreed to oral sex. He indicated that it lasted for a few minutes and he moved beside the complainant to have intercourse. His testimony was that he was in the process of removing the condom from the package when he asked the complainant if it would be OK not to wear a condom and she agreed as long as he did not ejaculate inside her. He denied she told him “no, not without a condom” and he denied having anal sex. Mr. Rivera’s evidence was that they had intercourse and as he approached orgasm he withdrew and masturbated himself to ejaculation. His evidence was that following the sexual encounter, he and the complainant laid on the bed and made small talk then he left. He testified he stopped for food on the way home and when he arrived at home, he went on Plenty of Fish and saw that the complainant was on-line and blocked her. Mr. Rivera’s evidence was that he was first alerted to a police investigation regarding the encounter when he received a voicemail from a police officer asking him to contact her. His evidence was that he was not aware of the nature of the complaint until he attended the police station the first time. He attended with a written statement he drafted in preparation for his meeting with police and he gave it to the interviewer during his video-taped statement. The voluntariness of both the written and video-taped statement were admitted by the defence. Mr. Rivera testified that the second time he attended at the police station he was arrested. Mr. Rivera’s cross-examination revealed that following contact with police, he drafted a handwritten statement which he gave police during his interview. While the voluntariness of both statements was conceded by the defence, Mr. Rivera sought a ruling to have at least the written statement tendered as an exhibit. For reasons given orally, that mid-trial motion was dismissed.

[11] In his written statement to police, which was prepared in advance of his first videotaped interview, he said the complainant initiated oral sex and got on top of him without a condom saying “don’t worry, I can’t get pregnant”. The statement contradicted Mr. Rivera’s earlier testimony that when he attended the police station the first time he did not know anything about the alleged complaint. When this was put to him in cross-examination, he testified the written statement was brought to the second meeting with the police. He eventually conceded that the statement was brought with him to the first meeting but changed his testimony to say he meant he didn’t know anything from the original voicemail left by police but had been provided details in subsequent conversations with police. He admitted he forgot about the complainant’s two rules when he spoke to police and he admitted to lying to the police about the complainant’s initiation of oral sex and about her alleged statement that a condom was not required because she could not get pregnant. He admitted to lying to the police saying that in those months, there was a lot of “metoo” material on the news and he was scared.

[12] In cross-examination Mr. Rivera denied he and the complainant had tentatively planned for him to spend the night with her on the night of their sexual encounter. He claimed that they had discussed having him spend the night on Saturday October 21st but they had not been able to get together that night. His evidence was contradicted by the text message exchange between him and the complainant the morning of Sunday October 22nd in which the complainant asked him what she should have on hand for breakfast.

The Position of the Parties

[13] Counsel for the defence argued the Crown failed to prove its case beyond a reasonable doubt. He argued Mr. Rivera gave his evidence in a straightforward and credible manner and explained the complainant agreed to have sex without a condom so long as he did not ejaculate inside her. He contends the fact the complainant and Mr. Rivera laid side by side and had small talk after the sexual encounter supports Mr. Rivera's testimony that nothing untoward happened. Counsel for the defence suggests I should accept Mr. Rivera's explanation as to why he lied to the police and accept his evidence as truthful. He suggests the complainant might have been motivated to fabricate her story because Mr. Rivera did not spend the night with her.

[14] Counsel for the Crown argues Mr. Rivera's version of events is neither credible nor reliable. The Crown contend the evidence given by the complainant proves its case beyond a reasonable doubt. She argues the complainant's evidence was credible and reliable and makes out the elements of the offence of sexual assault.

Decision

[15] For reasons that follow, I find Mr. Rivera guilty of sexual assault against the complainant.

Analysis

[16] Mr. Rivera is presumed innocent. The crown must prove beyond a reasonable doubt Mr. Rivera sexually assaulted the complainant. A sexual assault is an intentional application of force for a sexual purpose, without consent.

[17] This is a case of "he said she said" which raises issues of credibility and reliability. It is not a case of believing one person over the other. It is not a credibility contest. In assessing the evidence, if I believe the account of Mr. Rivera, I must acquit. If I don't believe Mr. Rivera but the evidence leaves me with a reasonable doubt, I must acquit. If the evidence does not leave me in doubt the offence occurred, I must assess whether the evidence proves the offence beyond a reasonable doubt (*R. v. W.D.* 1994 Canlii 76 (SCC)). I can accept some, all or none of the evidence of witnesses.

Assessment of Mr. Rivera's Evidence

[18] Mr. Rivera's evidence gives rise to serious issues regarding his credibility and reliability for the following reasons:

1. Mr. Rivera admitted at trial that he lied to police about a significant and material fact. He gave a written statement to police stating the complainant initiated and performed oral sex on him, got on top of him penetrating her vagina with his penis without a condom and assured him she could not get pregnant. This statement is contradicted by the complainant's evidence and by the rules set out by the complainant as well as Mr. Rivera's agreement to those rules. He admitted on cross-examination he did not remember those rules when he first attended the police station. He admitted he lied and

the events did not occur as conveyed to police but insisted he had asked for permission not to use a condom and the complainant agreed.

2. Mr. Rivera drafted his written statement before he had been provided with details of the allegations by police. His fabrication that the sexual encounter was initiated by the complainant without a condom and his assertion that she told him she could not get pregnant suggests to me he knew prior to going to the police station that the sexual encounter without a condom was the subject of the complaint. In addition, when confronted with the fact that he drafted the statement at a time he purported to know nothing about the allegations, he changed his testimony.
3. I find it improbable that the complainant who used condoms as a method of birth control, agreed not to use a condom, particularly with someone she did not know.
4. Mr. Rivera denied there was discussion that he would stay over the night of Sunday October 22nd. In cross-examination he clarified that the only discussion about his staying the night was in relation to Saturday night October 21st but they did not get together that night. This evidence is contradicted by the text messages between him and the complainant on Sunday morning October 22nd in which she asked him what she should have on hand for breakfast.

[19] For these reasons, I do not believe Mr. Rivera's claim the complainant agreed to have sex without a condom, but that does not necessarily mean he is guilty. The Crown must prove the alleged offence beyond a reasonable. The Crown adduced evidence from one witness, the complainant.

Assessment of the Complainant's Evidence

[20] The complainant delivered her evidence without much emotion and without hesitation, in a straightforward manner. Her evidence was not shaken in cross-examination. She testified the accused had vaginal intercourse with her without a condom followed by forced oral sex, followed by vaginal and anal intercourse with her without a condom. There is no dispute the complainant agreed to a sexual encounter. There is also no dispute she had two rules for the encounter. Condoms were a must and "no means no". She stated she told Mr. Rivera to put on a condom prior to the first instance of intercourse, he didn't do so assuring her he was clean and that it was ok. She testified that she told Mr. Rivera a second time to put on a condom when the second act of intercourse took place and he did not do so.

[21] I believe the complainant's evidence as to her requirement that Mr. Rivera wear a condom and her testimony that she did not agree to sex without a condom. It is consistent with her two rules and it is improbable that she would have risked pregnancy by agreeing to sex without a condom, particularly with a stranger. Her evidence is also consistent with her

attendance at the hospital the following day for a pregnancy test, STI tests and a sexual assault kit. While I do not disbelieve the balance of her evidence and events probably unfolded as described by the complainant, when I consider the whole of the evidence I am not satisfied that the requisite high standard of proof regarding the incidents of oral sex and the second instance of intercourse has been met.

[22] I draw no adverse inference from the fact that the complainant made small talk with Mr. Rivera after their encounter or that she took a few days to consider whether or not to contact police; it would be inappropriate for me to do so and would invoke myths and stereotypes about how victims of sexual assault should act. It stands to reason that a complainant might make small talk to keep things calm and avoid unwanted contact and it would not be unreasonable for a complainant to take some time to consider whether or not to proceed with a complaint given the stress and scrutiny of intimate details of ones' life involved in the criminal court process.

[23] I find the complainant's evidence to be proof beyond a reasonable doubt that Mr. Rivera committed a sexual assault against her by failing to wear a condom and engaging in sexual intercourse with her.

[24] *R.v. Ewanchuk* 1999 CanLii 711 (SCC) articulates that consent to sexual activity must be clear and ongoing. A participant can consent to sexual activity and revoke that consent. It is clear from the complainant's evidence that she was prepared to have sex with Mr. Rivera so long as he wore a condom and so long as he respected the rule "no means no". In my view, sex without a condom is a qualitatively different act than sex with a condom and the complainant's consent was withdrawn when Mr. Rivera penetrated her without a condom without her overt agreement. When a condom is used as a form of birth control or to prevent sexually transmitted infections, its use provides participants with a sense of security. The non-use of a condom against a participant's wishes not only usurps that individuals sexual autonomy and right to make decisions about how she/he/they engage in sexual activity, it is an activity against that person's will, fraught with the gamit of emotions resulting from an assault.

[25] If there is any doubt that sex without a condom amounts to sexual assault in these circumstances, I find that the complainant's consent was vitiated by fraud (s.265(3) *Criminal Code*).

Fraud

[26] To vitiate consent by fraud, the fraud must amount to a significant risk of serious bodily harm (*R. v. Hutchinson* 2014 SCC 19). The Supreme Court of Canada in *Hutchinson* upheld the accused's conviction of sexual assault for having poked holes in a condom without his girlfriend's knowledge, resulting in her pregnancy. The court made the following comment:

"The concept of "harm" does not encompass only bodily harm in the traditional sense of that term; it includes at least the sorts of profound changes in a woman's body — changes that may be welcomed or changes that a woman may choose not

to accept — resulting from pregnancy. Depriving a woman of the choice whether to become pregnant or increasing the risk of pregnancy is equally serious as a "significant risk of serious bodily harm" within the meaning of *Cuerrier*, and therefore suffices to establish fraud vitiating consent under s. 265(3)(c).

We conclude that where a complainant has chosen not to become pregnant, deceptions that deprive her of the benefit of that choice by making her pregnant, or exposing her to an increased risk of becoming pregnant by removing effective birth control, may constitute a sufficiently serious deprivation for the purposes of fraud vitiating consent under s. 265(3)(c).

[27] In my view, Mr. Rivera lead the complainant to believe he would wear a condom as he had previously agreed to do so and at the last minute he penetrated her without a condom telling her it would be ok. I find his failure to wear a condom increased the complainant's risk of pregnancy and constitutes a significant risk of bodily harm as set out in *Hutchinson*. Her consent was therefore vitiated by this action.

[28] In the circumstances, I find Mr. Rivera guilty of sexual assault on the complainant.

The Honourable Justice Nathalie Champagne

Released: June 26, 2019

CITATION: R. v. Rivera, 2019 ONSC 3918

COURT FILE NO.: 18-95

DATE: 20190626

**ONTARIO
SUPERIOR COURT OF JUSTICE**

HER MAJESTY THE QUEEN

– and –

Anibal Rivera

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The Honourable Justice Nathalie Champagne

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