Teacher With Camera Pen Acquitted Of Voyeurism

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In a recent criminal case in the Ontario Court of Appeal, a teacher was acquitted on a charge of voyeurism under section 162 of the *Criminal Code* despite having surreptitiously recorded 27 female students between ages 14 and 18 at the school where he taught. As detailed below, the majority of the Court of Appeal concluded that the Crown did not prove the element of the voyeurism offence which requires circumstances that give rise to a reasonable expectation of privacy.

Background

In *R. v. Jarvis*, 2017 ONCA 778, the accused was a high school teacher in Ontario. He was observed at school in conversation with a student while holding a pen with a flashing light on the top. The pen was confiscated by the principal and turned over to the police. The police officer conducted a cursory search of the pen, prior to obtaining a search warrant, which revealed a recording of female students with a focus on their breasts and cleavage. After obtaining a warrant, police searched the pen and found 19 videos with 30 different individuals, 27 of whom were female students, at the school.

The teacher was charged with voyeurism under section 162(1)(c) of the *Criminal Code*, which states:

> 162(1) Every one commits an offence who, surreptitiously, observes – including by mechanical or electronic means – or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if
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> (c) the observation or recording is done for a sexual purpose.

The accused conceded that he had made the recordings on his camera pen surreptitiously, and that the students were unaware of the recordings. The trial judge determined that the recordings were made in circumstances that gave rise to a reasonable expectation of privacy; however, he found that there could be other inferences to be drawn aside from making the recordings for a sexual purpose. The trial judge therefore acquitted the accused of all charges.

Issues Before the Court of Appeal

The Crown appealed the acquittal and argued the trial judge had erred by deciding the recordings were not made for a sexual purpose. The accused also argued that the trial judge had erred in admitting the contents of the camera pen because of the warrantless search. He also submitted that the trial judge erred in finding that the circumstances of the recordings gave rise to a reasonable expectation of privacy by the students.

The Court of Appeal was unanimous in its finding that the trial judge had erred when he found that there could have been some other purpose for the recordings. The trial judge had improperly focused on facts such as there being no other pornographic material found in the accused's possession, the fact that there was no nudity and that the camera pen could not zoom or enhance its focus. Yet he found that the teacher's behaviour was "morally repugnant and professionally objectionable." The Court of Appeal took a clear stance on the sexual purpose of the recordings, with particular emphasis on the fact that the accused is a teacher who took advantage of his position and breached the teacher-student trust relationship:

> [46] The respondent took advantage of his position as a teacher to make surreptitious videos of his teenaged female students. At least five of the videos focused on the cleavage of those female students. He was taking close up, lengthy views of their cleavage from angles both straight on and from above. The trial judge found that while it was most likely that the respondent was photographing female students' cleavage for a sexual purpose, "there may be other inferences". However, he failed to identify any such inference anywhere in his reasons. With respect to the trial judge, there were no other inferences available on this record.
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> [47] As the trial judge stated, this conduct by the respondent was morally repugnant. That finding is inconsistent with the trial judge's conclusion that the videos might not have been taken for a sexual purpose. The reason the teacher's conduct was morally repugnant was because of the sexual impropriety of taking surreptitious pictures of the breasts of his female students. Had he been taking surreptitious pictures of only their faces, his conduct would have been unacceptable as a breach of the teacher-student trust relationship, but not morally repugnant because of sexual impropriety.

The Court of Appeal was also unanimous in finding that the trial judge did not err in admitting evidence obtained by police without a warrant. Police had breached the accused's rights under section 8 of the *Charter of Rights and Freedoms*, which prohibits unreasonable search and seizure. However, the Court of Appeal agreed with the trial judge's decision to admit the evidence under section 24(2) of the Charter, in part because of the teacher's diminished expectation of privacy regarding the camera pen. As the Court stated, the teacher was using the camera pen at school, where the school board had supervisory jurisdiction over him and had a policy against making recordings. His camera pen was subject to search and seizure by the school board. The public interest factor of determining whether to admit evidence obtained in breach of section 8 also related strongly to the nature of a teacher's position. The Court concluded that the offence involved "multiple breaches of trust by a high school teacher, which heightens the public interest in its prosecution."

However, the Court of Appeal split its decision on the remaining issue. The majority decided that the trial judge had erred in concluding that the recordings were made "in

circumstances that give rise to a reasonable expectation of privacy". This is an element of the voyeurism offence in section 162(1)(c), and the teacher was therefore acquitted.

The majority of the Court concluded that in certain areas of the school, students do not have an expectation that they will not be observed or watched:

> [104] It is clear that students expect a school to be a protected, safe environment. It should be a place where their physical safety, as well as their personal and sexual integrity is protected. However, the areas of the school where students congregate and where classes are conducted are not areas where people have any expectation that they will not be observed or watched. While access to school property is often restricted, access is granted to students, teachers, other staff, and designated visitors. Those who are granted access are not prohibited from looking at anyone in the public areas. Here there were security cameras in many locations inside and outside the school. No one believed they were not being observed and recorded.

The majority of the Court made a distinction between expecting that a teacher will not make a recording for a sexual purpose and the expectation of privacy. The Court decided that the expectation not to be recorded arises from the teacher-student relationship, and not from a privacy expectation.

> [105] Clearly, students expect that a teacher will not secretly observe or record them for a sexual purpose at school. However, that expectation arises from the nature of the required relationship between students and teachers, not from an expectation of privacy. The expectation would also prevail, I would suggest, if a student met a teacher at a mall.

Ultimately, the majority of the Court of Appeal concluded that the teacher breached his relationship of trust with his students by making surreptitious recordings for a sexual purpose. However, they concluded that the offence of voyeurism required the Crown to prove that the students were in circumstances that gave rise to a reasonable expectation of privacy, and that the trial judge had erred in making that finding.

Justice Huscroft's dissenting reasons state that he saw the issue as a straightforward question: should high school students expect that their personal and sexual integrity will be protected while they are at school? He disagreed with the majority's conclusion that because students are seen at school, they have no reasonable expectation of privacy. Justice Huscroft came to a conclusion that favours student protection, stating as follows:

> [133] … In my view, the students' interest in privacy is entitled to priority over the interests of anyone who would seek to compromise their personal and sexual integrity while they are at school. They have a reasonable expectation of privacy at least to this extent, and that is sufficient to resolve this case.

Justice Huscroft summed up the paradoxical result of the majority's decision:

> The result is the opposite of what one would expect: surreptitious visual recording of high school students for a sexual purpose, while they are at high school, is not illegal.

Comment

The decision in R. v. Jarvis raises important and evolving issues regarding police investigation of electronic recordings and the burden of proving such offences in the criminal context. The issue will continue to evolve as society is presented with new technology for recording and storing images.

In the employment context, there remains no doubt that the school board could take steps to address the conduct of the teacher in *R. v. Jarvis*, including dismissal for cause and reporting the matter to the Ontario College of Teachers.

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