

For Publication

IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff/Appellee,

v.

NORMAN S. PALACIOS,
Defendant/Appellant.

Supreme Court Appeal No. 02-0023-GA
Superior Court Criminal Case No. 02-0110T

OPINION

Cite as: *Commonwealth v. Palacios*, 2004 MP 23

Argued and submitted on August 13, 2003
Saipan, Northern Mariana Islands
Decided November 3, 2004

Attorney for Appellant:
Edward C. Arriola, Esq.
P.O. Box 501788
Saipan, MP 96950

Attorney for Appellee:
Kevin A. Lynch
Assistant Attorney General, CNMI
Civic Center Complex
Susupe, Saipan, MP 96950

BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice; JOHN A. MANGLONA, Associate Justice

CASTRO, Associate Justice:

¶1 Appellant Norman S. Palacios (“Defendant”) appeals the Superior Court’s Judgment of Conviction that found him guilty of assault and battery by unlawful sexual contact. We find that Defendant’s conduct falls within the definition of assault and battery by sexual contact, and, therefore, we AFFIRM the trial court’s Judgment of Conviction.

I.

A. Factual Background

¶2 During the late night and early morning hours of November 19 and 20, 2001, Merly Dela Cruz (“the Victim”) was working as a waitress at the Port of Call Bar on Tinian. Her job required that she greet incoming patrons and direct them to their seats. Early in her shift, Defendant entered the bar accompanied by several guests. After approaching Defendant and his guests, the Victim stood with Defendant positioned on her right side. Defendant then walked in front of her and reached down with his right hand and placed the top half of the palm side of his hand on her crotch.¹ He touched her “hard,” and removed his hand within seconds. He then proceeded to his table and sat down beside his guests.

¶3 Following the incident, the Victim was visibly shaken and crying. She immediately called family members for assistance. Upon hearing about the incident, the Victim’s aunt, Edna Ortiz (“Ortiz”), and uncle, Jesus P. Cruz (“Cruz”), went to the bar. Once there, Cruz spoke with Jun Iglesia, the bar’s floor manager, and told him they were going to take the Victim to the police station to file a complaint against Defendant. They then left the bar and filed a complaint at the police station.

¶4 After the Victim filed the complaint, she returned to the bar with Ortiz and Cruz to complete

¹ At trial below, it was undisputed that Defendant touched the Victim’s crotch.

her work shift. Cruz confronted Defendant about the incident and told him that a complaint had been filed. Defendant then told Cruz that he wanted to speak with the Victim. After the Victim's shift had ended, and as she walked through the parking lot, Defendant approached her and tried to apologize.² Shortly thereafter the police arrived at the scene, arrested Defendant, and took him to the station. The Victim also went to the station where Defendant again apologized for the incident.

B. Procedural Background

¶5 On March 27, 2002, Defendant was charged, on a two-count Information, with Assault and Battery under the theory of unlawful sexual contact in violation of 6 CMC § 1202(a), and Disturbing the Peace, in violation of 6 CMC § 3101(a). He was convicted on both counts on August 8, 2002, following a bench trial. Defendant then moved to set aside the conviction. On August 28, 2002, the trial court issued an Order Supplementing Judgment of Conviction, which explained the convictions.³

II.

¶6 This Court has subject matter jurisdiction over this appeal pursuant to 6 CMC § 7107. Appellate jurisdiction over judgments and orders of the Superior Court is proper pursuant to 1 CMC § 3102(a) and Article IV, Section 3 of the Commonwealth Constitution. Defendant timely appealed the trial court's judgment.

III.

¶7 The sole issue before this Court is whether the conviction for Assault and Battery on the theory of unlawful sexual contact is supported by evidence that Defendant's intentional, non-consensual sexual contact was done for the purpose of gratifying or arousing the sexual desire of the

² In this conversation Defendant told the Victim, "[o]h, I'm sorry because I don't even know that you are Edna's niece-- Edna Ortiz's niece and Jess Cruz's niece." The Defendant and Cruz were friends, as they had grown up together. The Victim was not receptive to the apology, however, stating, "[j]ust because you don't know me, you do it-you do anything?" To this statement the Defendant replied, "I'm sorry, I was drunk."

³ The trial court further clarified the reasoning of the earlier Judgment of Conviction. In upholding the convictions, the court reasoned, "even where there is no testimony or direct evidence that the defendant was gratifying himself sexually, a finding of purposeful sexual arousal or gratification may be inferred from the type, nature, and circumstances surrounding the contact." The court focused its inquiry on "whether an ordinary prudent person would perceive from the defendant's actions, and all of the surrounding facts and circumstances, that the defendant's purpose or specific intention was arousal or gratification of sexual desire." *Commonwealth v. Palacios*, Crim. No. 02-0110 (N.M.I. Super. Ct. Sept. 18, 2002) ([Unpublished] Order Supplementing Judgment of Conviction at 3, lines 10-15).

Victim or himself.

¶8 In assessing whether there is sufficient evidence to prove an element of a crime, we review the evidence in the light most favorable to the prosecution, to determine whether any reasonable trier of fact could have found the element beyond a reasonable doubt.⁴ However, a trial court's interpretation of a statute is subject to de novo review on appeal.⁵

A. Assault and Battery: Terms and Definitions

¶9 Assault and Battery is defined by 6 CMC § 1202, which reads:

(a) A person commits the offense of assault and battery if the person unlawfully strikes, beats, wounds, or otherwise does bodily harm to another, or has sexual contact with another without the other person's consent.

(b) A person convicted of assault and battery may be punished by imprisonment for not more than one year.

6 CMC § 1202. In charging Defendant, the prosecution focused on the sexual contact language of 6 CMC § 1202(a). The Information read:

Count I: Assault and Battery

On or about November 19, 2001 on Tinian, Commonwealth of the Northern Mariana Islands, the defendant Norman S. Palacios, had unlawful sexual contact with Ms. Merly O. Delacruz without her consent in violation of 6 CMC § 1202(a) made punishable by 6 CMC § 4101(c).

¶10 Sexual contact is not defined by 6 CMC § 1202(a). It is, however, defined in the "Further Definitions" section of Title Six.⁶ Specifically, Section 103(r) defines sexual contact as follows: "[s]exual contact' means any touching of the sexual or other intimate parts of another person or any touching of another person by a person's sexual or other intimate parts done with the intent of gratifying or arousing the sexual desire of either party." 6 CMC § 103(r).

¶11 Defendant claims that his conviction under this statute is in error because, although he admits touching the sexual or other intimate parts of the Victim without her consent, he never intended for

⁴ *Commonwealth v. Delos Reyes*, 4 N.M.I. 340, 344 (1996).

⁵ *Commonwealth v. Cabrera*, 4 N.M.I. 240, 250 (1995).

⁶ All definitions found within this section apply throughout Title Six, unless otherwise specified or a different meaning is plainly required.

the touching to gratify or arouse his sexual desire or that of the Victim.⁷ Without this specific intent and culpable mental state, he argues, there can be no conviction for Assault and Battery under the theory of unlawful sexual contact.

B. The Atalig Decision

¶12 In *Commonwealth v. Atalig*, 2002 MP 20 ¶ 65, this Court held that Assault and Battery under 6 CMC § 1202(a) is not a specific intent crime, but is, rather, a general intent crime.⁸ “[S]pecific intent concerns willful and knowing engagement in criminal *behavior*, while general intent concerns willful and knowing *acts*.”⁹

¶13 In *Atalig*, we held that 6 CMC § 1202(a) is silent on the issue of intent. We found that when a statute is silent on the issue of intent, default to a general intent analysis is required.¹⁰ Importantly, in *Atalig*, the focus was on the issue of consent, not the defendant’s intent. Therefore, we did not consider the definition of sexual contact provided by 6 CMC § 103(r) in the *Atalig* analysis. We find that a proper analysis of Assault and Battery by sexual contact under 6 CMC § 1202(a) requires this Court to further define the *Atalig* decision.

¶14 The legislative drafting of 6 CMC § 1202(a) is somewhat confusing.¹¹ The term “unlawfully,” which routinely triggers a general intent analysis, modifies the phrase “strikes, beats, wounds, or otherwise does bodily harm to another,” while the phrase “or has sexual contact with another without the other person’s consent” immediately follows a comma, undefined by the term “unlawfully.” The phrase following the comma, however, is further defined by the sexual contact definition of 6 CMC § 103(r). As a result, we find that the phrase “unlawfully strikes, beats, wounds, or otherwise does bodily harm to another” requires a general intent analysis, while the

⁷ Defendant argues that because the touching was hard and lasted for less than one second, it cannot be seen as being intended to gratify or arouse the sexual desires of either him or the Victim.

⁸ *Commonwealth v. Atalig*, 2002 MP 20 ¶ 65.

⁹ Quoting *id.* at ¶ 66 (citing *United States v Berrios-Centeno*, 250 F.3d 294, 298-99 (5th Cir. 2001)).

¹⁰ *Id.* at ¶ 67 (citing *United States v. Hernandez Landaverde*, 65 F. Supp. 2d 567, 572 (S.D. Tex. 1999)).

¹¹ The Court has reviewed Standing Committee Reports 3-141 and 3-157, which address changes made to the Commonwealth Criminal Code, 6 CMC §§ 101, *et seq.* These reports do not shed any light on the Legislature’s intent concerning the sexual contact language of 6 CMC § 1202(a).

phrase “or has sexual contact with another person without the person’s consent,” when further defined by the sexual contact definition of 6 CMC § 103(r), requires a specific intent analysis.

C. Specific Intent Analysis of Sexual Contact

¶15 When a defendant is charged under 6 CMC § 1202(a) on the specific theory of sexual contact, the statutory definition of sexual contact provided by the Legislature in 6 CMC § 103(r) requires a specific intent analysis to satisfy the element of sexual contact.¹² Conviction under 6 CMC § 1202(a) for Assault and Battery by sexual contact requires: (1) sexual contact with another person; (2) without that person’s consent; (3) for the purpose of arousing or gratifying the sexual desire of either party. “Sexual contact,” however, is merely one element of Assault and Battery under 6 CMC § 1202(a), and we hold that establishing the issue of a defendant’s intent under the element of sexual contact is a question of fact, and the trier of fact may infer intent from a defendant’s behavior.¹³

¶16 We find persuasive the Montana Supreme Court’s sexual contact analysis provided in *Montana v. Olson*, 951 P.2d 571 (Mont. 1997), wherein the defendant argued on appeal that there was insufficient evidence to allow the District Court to find that he knowingly touched the victim’s breasts for the purpose of arousing or gratifying his sexual desire.¹⁴ The court ruled that the victim’s testimony was sufficient for the District Court to find that Olson knowingly had sexual contact with the victim, and that he knowingly rubbed the victim’s breasts for the purpose of arousing or gratifying his sexual desire. *Id.* Further, the Montana Supreme Court held that the District Court had acted within its discretion as the trier of fact when it found that Olson’s rubbing of the victim’s

¹² See *Colorado In re J.A.*, 733 P.2d 1197, 1199 (Colo. 1987) (finding the term “sexual contact,” which is defined as “the intentional touching of the victim’s intimate parts . . . or the intentional touching of the clothing covering the immediate area of the victim’s (or the actor’s) intimate parts for the purpose of sexual arousal, gratification, or abuse[,] . . . renders ‘sexual contact’ a specific intent type of criminal conduct.”); see also *Nebraska v. Schmidt*, 562 N.W.2d 859, 876 (Neb. Ct. App. 1997) (citing *California v. Short*, 61 Cal. Rptr. 2d 8 (Cal. Ct. App. 1997) (“finding that under Minnesota statutes, sexual penetration is a general intent crime, notwithstanding fact that sexual contact, [a] specific intent crime, has been deemed [a] lesser included offense of sexual penetration.”))

¹³ See *Montana v. Olson*, 951 P.2d 571, 578 (Mont. 1997) (citing *Montana v. Riley*, 893 P.2d 310, 314 (1995)) holding that “it is well settled that the jury may infer intent from defendant’s acts.”

¹⁴ *Id.* at 577-78.

breasts was for the purpose of arousing or gratifying his strange sexual desire.¹⁵ Like the *Olson* Court, we find that it is within the discretion of the trier of fact to find that Defendant's behavior was done for the purpose of arousing or gratifying his strange sexual desire.

¶17 The specific intent language is intended to distinguish an innocent, inadvertent or accidental touching of another's sexual or other intimate part from one done with conscious thought and motive.¹⁶ In this case, however, Defendant admits to the sexual touching and the record clearly shows that it was not innocent, inadvertent or accidental.

¶18 When determining whether a touching constitutes sexual contact, we must weigh the totality of the evidence and determine the motivation for the sexual touching.¹⁷ We must determine whether the evidence proves that such conduct was sexually motivated and intended to be the source of sexual arousal or gratification for either party. And should we find that the conduct, although clearly sexual in nature, was done to embarrass, degrade, humiliate or harass, we must then determine whether the Legislature intended such conduct to go unpunished by the statute.¹⁸ In other words, to determine whether the element of sexual contact has been satisfied, we must determine the scope of what constitutes sexual arousal or gratification.

¶19 Defendant argues that because the brief sexual touching actually hurt the victim and did not

¹⁵ In its decision, the Montana Supreme Court noted that the court below, as the finder of fact had concluded, men usually do not go around rubbing the breasts or vaginal areas of small girls. Indeed, someone that would consistently rub the breasts or vaginal areas of small girls is obviously committing a sexual assault and is doing so for his own strange sexual desire. *Id.* at 578.

¹⁶ In *Commonwealth v. Bergonia*, a case involving the sexual abuse of a child, the this Court correctly stated that “[t]he requirement of a particular purpose to arouse or gratify sexual desire distinguishes sexual imposition from ordinary assault and from non-criminal touching.” 3 N.M.I. 22, 37-38 (1992) (citing 1 A.L.I. Model Penal Code and Commentaries Part II § 213.4 at 400 (1980)).

¹⁷ There is no bright line rule or test used to establish whether a defendant's sexual touching was motivated by a desire to arouse or gratify either party's sexual desire. “The very nature of determining whether or not certain acts were done to arouse or satisfy a sexual desire, or that they did, can be determined primarily from the acts themselves as distinguished from outright admissions.” *North Dakota v. Jenkins*, 326 N.W.2d 67, 72 (N.D. 1982).

¹⁸ The Commonwealth Code's defined “Sexual Offenses,” 6 CMC §§ 1301, *et seq.*, does not include a separate statute which allows prosecution for gross sexual imposition or sexual assault and battery of an adult individual, although Section 1308 does prohibit sexual assault of an animal. Therefore, the sexual contact language found in Section 1202(a) takes on additional importance. An overly narrow reading of the term “sexual contact” would place many examples of inappropriate sexual touching under simple assault and battery. The term assault and battery by unlawful sexual contact, although charged and prosecuted under the identical Section 1202(a) “assault and battery” statute, serves as an added stigma and potent deterrent to such unacceptable contact.

arouse or gratify either party, there can be no assault and battery by sexual conduct. It tortures logic to accept the theory that the Legislature intended that those persons who deliberately violate the most intimate physical areas of another person, and happen to inflict pain upon that individual, would fall outside the scope of the sexual contact language of 6 CMC § 1202(a). A simple assault and battery charge, undefined by the sexual contact language of the statute, does not provide the necessary deterrent to such conduct or protect the dignity of the victims of such egregious acts.

¶20 In addition, sexual arousal and gratification are quite amorphous and defy a narrow definition. Conduct that arouses or gratifies one individual may do nothing for another. Thus, establishing sexual gratification or arousal can prove challenging. In *Commonwealth v. Atalig*, Crim. No. 99-0098 (N.M.I. Super Ct. June 23, 2000) (Order at 7), the Superior Court correctly found that the sexual contact element was satisfied because the defendant testified that he wanted to make love to the victim and that the sexual touching of the victim's breast had resulted in an erection. Such an obvious display of sexual arousal and gratification is not a threshold, however, and the Court may find such a showing of arousal or gratification from less obvious evidentiary displays or from the type, nature and circumstances surrounding the act itself.¹⁹

¶21 The evidence in the record supports a finding that the conduct at issue was done for the purpose of sexual gratification.²⁰ Individuals do not routinely go around touching the vaginas of the hostesses that greet them at dining establishments. Defendant deliberately touched an intimate and sexual part of the Victim's body, and this displayed an unmistakable sexual motive for gratification,

¹⁹ See *Ohio v. Mundy*, 650 N.E.2d 502, 510 (Ohio Ct. App. 1994); see also *North Carolina v. Connell*, 493 S.E.2d 292, 294 (N.C. Ct. App. 1997) (finding that a defendant's purpose in committing the act in indecent liberties cases is seldom can be proved by direct evidence and must ordinarily be proven by inference); *North Dakota v. Jenkins*, 326 N.W.2d 67, 72 (N.D. 1982) (finding that the very nature of determining whether or not certain acts were done to arouse or satisfy a sexual desire, or that they did, can be determined primarily from the acts themselves as distinguished from outright admissions); *Montana v. Olson*, 951 P.2d 571, 578 (Mont. 1997) "(In addressing the issue of 'purpose' under the element of sexual contact, we have stated, 'intent is a fact question for the jury, and it is well settled that the jury may infer intent from defendant's acts.')

²⁰ The Victim testified to the following: (1) Defendant touched her "hard" in the crotch area; (2) he then walked away without apologizing and sat down at the table with his guests; (3) the touching made her sad and, as a direct result, she felt bad and began to cry; (4) she was so upset that she immediately called members of her family to report the incident and request assistance; (5) she was so upset over the incident that she immediately filed a criminal complaint against Defendant; (6) Defendant repeatedly apologized for the incident, but only after he determined that the Victim was the niece of a close friend.

no matter how brief the contact or how unpleasant the contact may have been for the Victim. The touching resulted in obvious embarrassment, humiliation and degradation to the Victim and the record supports a finding that it was meant to do just that.²¹ There is a difference between an intentional, non-consensual touching that violates an intimate or sexual area of one's body and one that does not. We will not look the other way and classify this type of touching as a simple assault and battery devoid of sexual contact.²²

¶22 We read the sexual contact language of 6 CMC § 1202(a) to encompass all intentional, non-consensual sexual touching, including those that embarrass, degrade, humiliate, or harass. When such purposeful conduct intentionally targets the sexual or intimate spheres of an individual's body, it cannot be said that some form of sexual gratification does not motivate the conduct. Notions of human dignity and common decency in a civilized society require that such conduct does not go undeterred.

¶23 When Defendant's conduct is subjected to this analysis, it is clear that the touching does in fact fall within the definition of sexual contact. First, the touching was intentional, non-consensual, and targeted an intimate and sexual part of the body. Second, the record before the Court supports a finding that the sexual touching was done to embarrass, degrade, harass or humiliate. Defendant's

²¹ See Excerpts of Record at 2, lines 12-17 & at 9-12.

²² Many jurisdictions include such conduct in their definition of unlawful sexual contact. For example, the federal statute on sexual abuse defines sexual contact as "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with the intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C. § 2246(3) (2004). In Wisconsin, sexual contact is defined as

[i]ntentional touching by the complainant or defendant, either directly or through clothing by the use of any body part or object, of the complainants or defendants intimate parts if that intentional touching is either for the purpose of sexually degrading; or for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant or if the touching contains the elements of actual or attempted battery.

Wis. Stat. § 940.225(5)(b)(1) (2003). See also Colorado, COLO. REV. STAT. § 18-3-401(4) (2004); Connecticut, CONN. GEN. STAT. § 53(a)-65(3) (2003); District of Columbia, D.C. CODE ANN. § 22-3001 (2004); Delaware, DEL. CODE ANN. tit. 11 § 761(f) (2004); Florida, FLA. STAT. ch. 822.071 (1)(G) (2003); Maine, ME. REV. STAT. ANN. tit. 17 § 25 (1)(D) (2003); Michigan, MICH. STAT. ANN. § 251(1)(D) (Michie 2003); Montana, MONT. CODE ANN. § 45-2-101(66) (2004); Nebraska, NEB. REV. STAT. ANN. § 28-318(5) (Michie 2003); New Jersey, N.J. Stat. Ann. § 2C:14-1(d) (West 2004).

Other jurisdictions have applied a reasonableness standard to the specific intent analysis of defining sexual contact. For example, Guam's statutory definition of sexual contact includes: "the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification." 9 GUAM CODE ANN. § 25.10(a)(8) (2004). See also Delaware, DEL. CODE ANN. tit. 11 § 761(f)(2) (2004); Michigan, MICH. STAT. ANN. § 251(1)(D) (Michie 2003); Nebraska, NEB. REV. STAT. ANN. § 28-318(5) (Michie 2003); New Hampshire, N.H. REV. STAT. ANN. § 632:A:1(4) (2003); Rhode Island, R.I. GEN. LAWS § 11-37-1(7) (2004); Tennessee, TENN. CODE ANN. § 39-13-501(6) (2004).

repeated apologies evidence more regret over the identity of the Victim than for the offensive nature of the conduct itself.²³

IV.

¶24 For the foregoing reasons, Defendant's conviction for Assault and Battery by sexual contact is upheld and the trial court's Judgment of Conviction is AFFIRMED.

SO ORDERED THIS 3 RD DAY OF NOVEMBER 2004.

/s/

ALEXANDRO C. CASTRO
Associate Justice

/s/

JOHN A. MANGLONA
Associate Justice

MIGUEL S. DEMAPAN, Chief Justice, Dissenting:

¶25 The issue before this Court is whether the conviction for Assault and Battery on the theory of unlawful sexual contact is supported by evidence that Defendant's intentional non-consensual sexual contact was done for the purpose of gratifying or arousing the sexual desire of the Victim or Defendant. Section 1202(a) of Title 6 of the Commonwealth Code has two parts:

- (i) a person commits the offense of assault and battery if the person unlawfully strikes, beats, wounds or otherwise does bodily harm to another, or
- (ii) has sexual contact with another without the other person's consent.

See 6 CMC § 1202(a).

¶26 The issue that one has to resolve here is 6 CMC ¶ 103(r) where "sexual contact" is defined to mean any touching of the sexual or other intimate parts of another person or any touching of

²³ The wording of Defendant's apology establishes that, had he not discovered that the Victim was the niece of a friend, no apology would likely have been given and the conduct, in Defendant's eyes, would have been acceptable. This reaction supports a conclusion that the touching was intended to harass, degrade, embarrass or humiliate the Victim.

another person by a person's sexual or other intimate parts done with the intent of gratifying or arousing the sexual desire of either party. While I agree with the majority that there is a clear showing of assault and battery by the act of a defendant's unlawfully striking, beating, wounding or otherwise doing bodily harm to a victim, I disagree that the act of Defendant constitutes an intent to gratify the sexual desires of the Victim or Defendant or both. While all unlawful touching would fall under the ambit of Assault and Battery, not all unconsented touching of the body's intimate parts would be for the purpose of gratifying or arousing the sexual desires of either party or both. Since the proofs involved in the first part of 6 CMC § 1202(a), the second part of 6 CMC § 1202(a) and 6 CMC § 103(r) are not identical, and because the evidence is not there to satisfy the requirement under Section 103(r) sexual arousal or gratification, I would remand this case to the trial court for re-sentencing.

¶27 I must, therefore, respectfully dissent.

DATED THIS 3RD DAY OF NOVEMBER 2004.

/s/
MIGUEL S. DEMAPAN, Chief Justice