SUPREME COURT OF CANADA

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Case in Brief: *R. v. Jarvis*

Judgment of February 14, 2019 | On appeal from the Court of Appeal for Ontario
Neutral citation: 2019 SCC 10

A teacher who recorded students with a hidden camera is guilty of voyeurism, the Supreme Court has ruled. Students doing normal activities at school don't give up their privacy rights even though technology makes it easier to record them.

Voyeurism became a crime in the *Criminal Code* in 2005. It is when someone secretly watches or records someone else who reasonably expects privacy, in one of three specific situations. One of the situations is where the watching or recording is done for a sexual purpose.

Every crime in the *Criminal Code* has specific requirements or "elements" that are part of that crime's definition. When someone is found "guilty beyond a reasonable doubt," it means that each element of the crime has been proven against them beyond a reasonable doubt. For the crime of voyeurism, there are three elements. They are (1) the secret watching or recording, (2) the reasonable expectation of privacy of the person being watched or recorded, and (3) the specific situation (e.g., the sexual purpose).

Mr. Jarvis was a high school teacher. He used a camera hidden inside a pen to record female students doing ordinary school activities in classrooms, hallways, and other common areas. Most of the videos focused on female students' faces and upper bodies, especially their chests. The students didn't know they were being recorded. The videos were of high quality and could be downloaded onto a computer.

The trial judge looked at the evidence and said the students had a reasonable expectation of privacy. But he wasn't convinced beyond a reasonable doubt that Mr. Jarvis made the recordings for a sexual purpose. He found Mr. Jarvis not guilty because of this. The majority of the Court of Appeal said there was proof beyond a reasonable doubt that Mr. Jarvis *had* made the videos for a sexual purpose. But it didn't think the students had a reasonable expectation of privacy at the time. It also said Mr. Jarvis was not guilty.

The Supreme Court had to decide one question. This was whether students could have reasonably expected privacy—specifically, privacy from the type of secret recording Mr. Jarvis did—in the common areas of their school. All of the other elements had been proven beyond a reasonable doubt.

All the judges at the Supreme Court agreed that Mr. Jarvis should be found guilty. They said the students reasonably expected not to be recorded by a teacher's hidden camera at school. To determine when someone should be reasonably able to expect privacy, the majority said courts need to look at the entire situation. This could include where the watching or recording happened, how it was done, and any rules or policies in place. It could also include whether the person was just watching or was recording (because a recording can capture more detail, is permanent, and can be easily viewed, edited, and shared). It could also include looking at the relationship between the parties. The majority also looked at the way privacy has been defined in *Charter* cases. Technology has made it much easier to get, store, and share information about others. But the majority said that doesn't mean people have to give up their right to privacy just because there is a risk it can be violated. Technology may make it easier to violate someone's privacy, but that doesn't mean a person should have to accept it.

In this case, the majority noted the students were recorded in a school. The recording violated school board policy, as well as the relationship of trust between a teacher and a student. The videos targeted particular female students, often focusing on their breasts. The students would never expect to be recorded in such a way, by a teacher, in their school. They clearly had a reasonable expectation of privacy.

This case came to the Supreme Court as an appeal "as of right." That means there is an automatic right to appeal, and the Court's permission isn't needed. The right is automatic in criminal cases when a Court of Appeal judge dissents (disagrees) on a point of law, as happened here. Both the person charged and the Crown (the prosecution) can appeal when this happens. In this case, the Crown appealed. This was the first time the elements of the crime of voyeurism in s. 162(1) of the *Criminal Code* were considered by the Court.

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Breakdown of the Decision: ***Majority:*** Chief Justice Richard Wagner allowed the appeal (Justices Abella, Moldaver, Karakatsanis, Gascon, and Martin agreed) | ***Concurring:*** Justice Malcolm Rowe said Charter cases about privacy shouldn't have been used to interpret "reasonable expectation of privacy" in s. 162(1) of the *Criminal Code*, but agreed the students had a reasonable expectation of privacy—and that it was violated, because the recordings negatively impacted their autonomy and sexual integrity (Justices Côté and Brown agreed)

More information (case # 37833): Decision | Case information | Webcast of hearing

Lower court rulings: trial (Ontario Superior Court of Justice) | appeal (Court of Appeal for Ontario)