IN THE SUPREME COURT OF THE
MISSISSIPPI BAND OF CHOCTAW INDIANS

MISSISSIPPI BAND OF CHOCTAW INDIANS — APPELLANT

v.

CAUSE NO. SC 2013-08

ANTHONY YORK, JR. — APPELLEE

OPINION AND ORDER ON INTERLOCUTORY APPEAL FROM THE CHOCTAW TRIBAL CRIMINAL COURT

(SMITH, J writing *Per Curium*)

This matter is duly before the court pursuant to a November 15, 2013, filing of a Request for Permission to File Interlocutory Appeal pursuant to Choctaw Tribal Code Sec. 7-1-10. Appellant Mississippi Band of Choctaw Indians sought review from a final order of the trial court that was rendered from the bench on November 14, 2013, in Criminal Cause number 2013-788. At the time of the filing of the petition, no written order or opinion had been filed by the lower court; accordingly, this Court December 13, 2013, directed that a written order or opinion be prepared and filed pending further proceedings. On December 14, 2013, the Choctaw Tribal Domestic Violence Criminal Court issued its written order filed with this Court December 15, 2014, the pertinent part of which reads as follows:

> **The Court having heard tribe's Motion to Reconsider Ruling on Motion in Limine, and the defense counsel's answer to said motion, finds the phrase "for the purpose of arousing or gratifying sexual desire of either party" applies to "any touching of the sexual or other intimate parts of the person of another" and applies to "taking indecent liberties with another." Motion denied.**

This Court on January 16, 2014, issued its Order Granting Permission to File for Interlocutory Appeal, the matter has been briefed by Petitioner/Appellant and Respondent/Appellee, arguments were heard July 24, 2014, and the cause duly submitted for review and decision.

This matter seeks clarification of the proper interpretation to be ascribed to the Choctaw Tribal Code's statute on sexual assault. That provision reads as follows:

> §3-3-29 Sexual Assault
> A person is guilty of sexual assault if that person subjects another to any sexual contact:
> (1) with the knowledge that the conduct is offensive to the other person;

(2) with knowledge that the other person suffers from a mental disease or defect which renders the other person incapable of appraising the nature of the conduct;
(3) with knowledge that the other person is unaware that a sexual act is being committed; or
(4) with knowledge that the other person's power to appraise or control the conduct is substantially impaired due to the excessive use or consumption of drugs, intoxicants, or other means of preventing resistance.

Sexual contact is any touching of the sexual or other intimate parts of the person of another or otherwise taking indecent liberties with another for the purpose of arousing or gratifying sexual desire of either party.

Sexual assault is a Class A offense.

Stated in its essence, the divergence of interpretations is over whether or not that final portion of the sexual contact language italicized above and reading "for the purpose of arousing or gratifying sexual desire of either party" requires both a "touching of the sexual or other intimate parts of the person of another" in combination with additional actions that would somehow constitute "otherwise taking indecent liberties with another."

We hold that the plain language of the statute criminalizes two separate categories of acts constituting forms of sexual assault. Section 1-5-7 of the Choctaw Tribal Code where captioned "Principles of Construction" requires at subsection (4) "This Tribal Code shall be construed as a whole to give effect to all its parts in a logical, consistent manner." Therefore, the Sexual Assault Statute should be read in light of that provision.

The first paragraph of the statute enumerates four **specific circumstances** whereunder ***sexual contact*** of a sexual nature is forbidden – all four of which require actual or imputed knowledge: (1) where offensive to the other person; (2) where the victim suffers mental disease or defect rendering said person incapable of appraising the nature of the contact; (3) where the victim is unaware a sexual act is being committed; or (4) the victim's power to appraise or control the conduct is substantially impaired by specified causes preventing resistance. The next paragraph begins by stating that "***Sexual contact*** is any touching of the sexual or other intimate parts of the person of another...." (Bold, underlining & italics added.) The balance of the second paragraph continues, "or otherwise taking indecent liberties with another for the purpose of gratifying sexual desire of either party." The term "or otherwise" when used as an adverb before a verb, as it is here, is used to mention something that is not the thing just referred to – it encompasses as well kindred classes or forms of actions deemed sexually salacious.

State Superintendent of Education et. al. v. Alabama Education Association, No. 11-11266, dated October 25, 2013, (Ala. Sup. Ct.) on a Certified Question from the United States Court of Appeals for the Eleventh Circuit, stated at slip opinion pp. 19-20: ""The words, 'or otherwise' in law when used as a general phrase following an enumeration of particulars are commonly interpreted in a restricted sense as referring to such other matters as are kindred to the classes before mentioned, receiving ejusdem generis interpretation." (citing Goode v. Tyler, 237 Ala. 106, 186 So. 129 (1939), and State v. Tyler, 100 Fla. 1112, 130 So. 721 (1930))); and Amos v. State, 73 Ala. 498 (1883) We see our interpretation and conclusion as consistent with the above.

One caveat, however, to the claim of Petitioner/Appellant's brief, at P. 7 to the following effect: "The Tribe would respectfully submit that a lain reading of the statute does not require proof of the taking of indecent liberties or a gratification of lust so long as there is an offensive touching of the sexual or other intimate part of the person of another." The clear wording of each of the four enumerated forms of sexual contact contains along with the standard elements the additional component of "knowing," whether on the part of the perpetrator or of the victim.

In summation, the ruling of the lower court judge is hereby reversed and the cause remanded for further proceedings not inconsistent with this ruling: the Prosecution is required to prove either sexual contact involving any touching of the sexual or other intimate parts of the person of another under any of the four circumstances enumerated above, or the Prosecution must prove a sexual assault of some other nature not previously mention before and so done for the purpose of arousing or gratifying sexual desire of either party.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the above-captioned cause be and hereby is ordered remanded for further proceedings not inconsistent with this opinion.

This, the 25th. Day of August, 2014.

Hon. Kevin D. Briscoe
Chief Justice
Choctaw Supreme Court

CERTIFICATE OF SERVICE

I do hereby certify that I have this, the 26th day August, 2014 caused to be forwarded by the United States Mail, a true and correct copy of the above and foregoing document to the below listed counsel of record.

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