

Citation: *R. v. Dick*, 2016 YKTC 32

Date: 20160120
Docket: 14-00746
Registry: Whitehorse
Heard: Ross River

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

DENNIS IVAN DICK

Publication of information that could disclose the identity of the complainant or witness has been prohibited by court order pursuant to s. 486.4 of the *Criminal Code*.

Appearances:
Joanna Phillips
Malcolm E.J. Campbell

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] CHISHOLM J. (Oral): Mr. Dennis Dick is charged that he sexually assaulted M.T. on three separate occasions. These offences are alleged to have been committed in 2013 in Ross River. The complainant is a young person who was 13 years old at the time of the alleged incidents.

[2] M.T. was the only witness to testify for the Crown. She testified that in the spring of 2013, Mr. Dick approached her on two separate occasions while he was driving a motor vehicle and she was walking on the streets of the community.

[3] On the first occasion, Mr. Dick was driving a grey truck. According to M.T., another individual, Z., was also in the vehicle. M.T. was walking to a community garbage pickup. Mr. Dick drove by her but stopped and backed up. He made the comment to M.T. that she had "a nice ass." She testified that he then put his hand out the window of the truck and grabbed her chest. He attempted to reach under her clothing but she shoved his hand away.

[4] On the second occasion, Mr. Dick was driving a black car. M.T. was going to the laundromat with friends. It was dark. Similar to the first incident, Mr. Dick stopped his vehicle beside her. M.T. testified that she declined Mr. Dick's offer that she get in his car. She testified that, after this exchange, Mr. Dick tried to grab her by the crotch. The friends whom she was with were standing on the other side of the vehicle when this occurred.

[5] The third incident allegedly occurred in December of 2013. M.T. was at Mr. Dick's house visiting with his daughter after school. Mr. Dick pulled her into the bathroom and sexually assaulted her. He pulled down her pants and underwear to her knees. He placed one hand over her mouth. He used his other hand to take one of her hands and to guide it to his penis. He subsequently placed his penis on her buttocks and close to her vagina. She was able to struggle free of his hold and left the bathroom and the residence. She was terrified.

[6] Mr. Dick testified and confirmed that he knew M.T., as she is a friend of his daughter. He does not know her well. He agrees he met her in circumstances similar to what M.T. described, except that he at no time had any sexual contact with her.

[7] He recalls stopping his grey truck on one occasion when M.T. was walking down a road in Ross River. She was with three or four other people. He believes he may have tried to touch her on the shoulder.

[8] He also recalls talking to her from his black car on one occasion. As Mr. Dick bought the car in 2014, he believes it was in that year, as opposed to 2013 as suggested by M.T. Two young people were with her. M.T. was asking him about marijuana during their conversation.

[9] Mr. Dick recalls an incident where there was physical contact between him and M.T. in the bathroom area of his home, but he denies touching her in a sexual manner.

[10] This is not a credibility contest between the Crown and defence witnesses. The burden is, of course, on the Crown to prove the charges beyond a reasonable doubt. This burden never shifts to the defence.

[11] When assessing the evidence of younger witnesses with respect to credibility, I am not to hold them to adult standards. As the Supreme Court of Canada has stated in *R. v. W. (R.)*, [1992] 2 S.C.R. 122 at para. 26:

... Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate. ...

[12] This does not lead to a different standard of proof in criminal cases involving a child witness. All it means is that in assessing a child's evidence, I should be cognizant of the child's mental development in taking a common sense approach to his or her

testimony (see *R. v. B. (G.)*, [1990] 2 S.C.R. 30). I should assess a child's evidence in the context of his or her age, at the time of the events and at the time of testifying.

[13] M.T. testified in a forthright manner. She was emotional at times while giving her evidence. There were clearly difficulties in her recollection of details from the two earlier incidents.

[14] For example, when describing the incident where Mr. Dick stopped his truck beside her, she stated in direct examination that he tried to touch her. He held onto her shirt and almost touched her bra. In cross-examination, she said that Mr. Dick attempted to use his other hand to touch her, but not before she was able to extricate herself from the situation. It was also revealed that she indicated in a statement to police that Mr. Dick had touched her breast under her bra.

[15] Regarding the incident where he stopped his black car while she was walking to the laundromat, she indicated that Mr. Dick tried to grab her crotch, but was unable to as she was backing away from him. She had told the police, however, that he had grabbed her by the crotch and pulled her close to him.

[16] Mr. Dick's evidence regarding these two incidents has its own concerns. For example, it is strange why he would stop his truck to talk to and, ultimately, attempt to touch the shoulder of a young girl he only knows casually.

[17] But again, this is not a credibility contest. I must be convinced beyond a reasonable doubt in order to convict. With respect to counts 2 and 3, I have a reasonable doubt. As a result, I acquit Mr. Dick of these offences.

[18] I now turn to the most serious of the allegations, which is alleged to have occurred in Mr. Dick's home. Mr. Dick recalls an incident where he was coming out of his bedroom and he banged into M.T. He knocked her into the bathroom and says he grabbed her shoulder to prevent her from falling down. Oddly, in my view, he described the location in the house of other family members at the moment of this occurrence. On the other hand, he indicated that there was nothing unusual about the incident that would make him remember it.

[19] As with M.T.'s other allegations, Mr. Dick had an unusually detailed recollection of an innocuous event. I find that he was tailoring his evidence in an attempt to respond to the sexual assault allegation in the bathroom. There was no air of reality to his description of accidentally knocking M.T. into the bathroom from the hallway.

[20] Additionally, Mr. Dick was cavalier and dismissive with respect to M.T.'s allegations. In particular, he stated that he would have had to have three hands to have accomplished the bathroom sexual assault described by her. I also note that Mr. Dick has some criminal convictions for offences of dishonesty. I do not believe Mr. Dick's description of what happened between him and M.T., and I reject it.

[21] M.T. provided a detailed description of being sexually assaulted in Mr. Dick's bathroom and leaving the residence in tears. In my view, there were no major inconsistencies in her testimony.

[22] The defence points to the complainant's confusion over the timing of the incidents as a reason to question the reliability of her evidence.

[23] The Information was amended at the end of the Crown's case to conform to the evidence. The Information had initially set out the dates of the three alleged offences as having occurred at various points in 2014. M.T., though, was able to describe in some detail the timeframe in which this incident took place. She had been attending school in Whitehorse in the fall of 2013 and had returned to Ross River before Christmas. She did not return to Whitehorse after the holiday season, but instead completed the rest of the school year in Ross River. She recalls this incident occurring not long after her return to Ross River in the month of December 2013.

[24] In *R. v. R.W.* [2006] O.J. No. 2272 (C.A.), the Court considered a timing inconsistency in the evidence of the complainant. The Court, while noting that the inconsistency was significant, stated at para. 7:

... However, the inconsistency did not relate to any essential element of the offences in question, or to any aspect that the defence raised except as part of the overall assessment of the child's credibility. ...

[25] In any event, in the matter before me, Mr. Dick acknowledges physical contact occurred between him and M.T. around the bathroom area. Considering his testimony, the issue of timing is of little importance.

[26] The defence states that M.T.'s description of the bathroom incident was problematic in two respects. Firstly, she did not mention to the police that Mr. Dick had forcibly moved her hand to his penis; and secondly, she was uncertain as to whether Mr. Dick's pants were down during the assault.

[27] Considering the portion of M.T.'s statement to the police which was put to her in cross-examination, she simply indicated that she remembered Mr. Dick forcing her hand

to his penis, when reading her statement before trial. The significance of whether his pants were down is diminished by her description, which I accept, of Mr. Dick being behind her in the bathroom. In other words, she was not looking at him. I have considered these matters and, in my view, they do not detract from either her credibility or from her reliability.

[28] The defence also argues that, since M.T. testified in cross-examination to not having much recollection about the incidents in question, I should be concerned about her evidence. In fairness, the question that was put to her by defence counsel was asked when she was being examined about one of the earlier allegations. Although the question was in the plural — that is to say, incidents and not incident — her detailed description of the bathroom incident did not suggest that she had any difficulty remembering what occurred.

[29] I find that M.T. was both credible and reliable regarding the bathroom incident. Considering the totality of the evidence presented, I am satisfied that the Crown has proven beyond a reasonable doubt that Mr. Dick sexually assaulted M.T. in his bathroom in the month of December 2013.

CHISHOLM T.C.J.