SUPREME COURT OF YUKON

Citation: *R v DLD*
2024 YKSC 34

Date: 20240705
S.C. No. 22-01516
Registry: Whitehorse

BETWEEN

HIS MAJESTY THE KING

AND

D.L.D

Publication, broadcast or transmission of any information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*.

Before Justice K. Wenckebach

Counsel for the Crown — Neil Thomson

Counsel for the Defence — Amy E. Chandler (Agent for Malcolm E.J. Campbell)

Counsel for the Complainant — Susan E. Bogle

This decision was delivered in the form of Oral Reasons on July 5, 2024. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] WENCKEBACH J. (Oral): The defendant, Mr. [D.], is charged with one count of sexual assault. He has brought an application under s. 276 of the *Criminal Code*, RSC 1985, c C-46 ("*Criminal Code*" or "*Code*"). He seeks to introduce as evidence sexual activity he alleges occurred between him and the complainant before the alleged sexual assault.

[2] The complaint alleges that she was sexually assaulted in the early hours of the morning while she was asleep in her own bed. Mr. [D.] alleges that he, the complainant, and other people spent the day and night of the alleged incident partying. During the day, he and the complainant engaged in consensual sexual activity. The complainant consumed alcohol and illegal drugs throughout the time she was partying.

[3] He also alleges that the complainant gave two inconsistent versions of the sexual assault, and he notes that another witness' statement is also inconsistent with the complainant's statements. He submits that, due to her intoxication, the complainant may have been confused and transposed the consensual sexual activity in the afternoon with what she imagined occurred in the bedroom. Alternatively, the complainant regretted the sexual activity and for that reason concocted the sexual assault allegation.

[4] Mr. [D.]'s counsel did not, however, elaborate on his alternative theory and so I will address only the theory that the complainant hallucinated or imagined the sexual assault.

[5] I previously ruled that Mr. [D.] met the stage one requirements under s. 276. The application is now at the stage two phase. In order to be admissible, I must be satisfied that the evidence is not being adduced for the purpose of supporting the twin myths; is relevant to an issue at trial; is of specific instances of sexual activity; and has significant probative value that is not substantially outweighed by the danger or prejudice to the proper administration of justice. In considering these issues, I must take into account various factors set out at s. 276(3) of the *Criminal Code*.

[6] Crown and complainant's counsel submitted that Mr. [D.] was adducing evidence in support of the twin myths but did not focus their arguments on that issue.

[7] In my opinion, while the evidence could play to the twin myths, it is not being adduced for those purposes. Mr. [D.]'s position is that the complainant was confused. The earlier sexual activity explains why she imagined that Mr. [D.] had sexual activity with her. This theory does not ask the jury to infer that the complainant was more likely to have consented or is less worthy of belief because of the previous sexual activity.

[8] The real issues in this matter, I believe, are whether the evidence is relevant and if so whether it has significant probative value meriting its admission.

[9] Mr. [D.]'s application is based on an affidavit he filed in which he describes some of what the complainant and another person, who was in the bed at the time the alleged sexual assault occurred, stated in their statements to the police.

[10] The Crown submits that Mr. [D.]'s repetition of the complainant's and third-party's statements is hearsay and inadmissible at this hearing.

[11] Mr. [D.] described the complainant's descriptions of the alleged sexual assaults. He provided this evidence not to prove that what the complainant said was true and that what the third party also said was true, but to show that what she said was inconsistent. It is therefore not hearsay.

[12] On the substance of Mr. [D.]'s application, the Crown and complainant's counsel submit that there is no air of reality to Mr. [D.]'s theory. They state that the alleged consensual activity between Mr. [D.] and the complainant was very different than the alleged sexual assault. Mr. [D.]'s evidence about the consensual sexual activity was that it took place in a car outside a convenience store, consisted of kissing and fondling, and occurred while Mr. [D.] and the complainant were waiting for others who were buying snacks. In contrast, the complainant reported that the sexual assault occurred in her

bedroom, Mr. [D.] had his pants down, and either had his fingers in her vagina or was trying to touch her. These are not similar events that could be confused.

[13] Moreover, how much the complainant had to drink was unclear and Mr. [D.] does not name the type of illegal drugs the complainant was alleged to have consumed. The Crown submits that expert evidence would be required for the defence to be able to put forward that it was possible for the complainant to have, for want of a better word, "hallucinated" the events she described.

[14] The threshold for establishing relevancy is low.

[15] In *R v LS*, 2017 ONCA 685, the Court of Appeal described relevancy as follows:

> [89] … Evidence does not have to establish or refute a fact in issue to be relevant; it need only, as a matter of common sense and human experience, have some tendency to make the existence or non-existence of that material fact more or less likely. There is a big difference between evidence that is relevant and evidence that is determinative. …

[16] For the purposes of this application, I am prepared to accept that the evidence Mr. [D.] seeks to adduce may have some tendency to make it more likely to conclude that the complainant hallucinated that he sexually assaulted her.

[17] I will turn next to whether the evidence has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

[18] For evidence to have significant probative value, it must have more than trifling relevance and must be capable, in the context of all the evidence, of leaving the factfinder with a reasonable doubt. To address the strength of the probative value of the evidence, I will examine the strength of the basis for concluding that the complainant hallucinated the alleged sexual assault.

[19] I agree with the Crown and complainant's counsel that the evidential basis upon which the jury could conclude that the complainant hallucinated or imagined the sexual assault, at this point, is not strong.

[20] Mr. [D.]'s counsel submitted that the complainant provided two very different descriptions of the alleged sexual assault. He also submits that the third-party statement is inconsistent with the complainant's statement. In support of the submission, Mr. [D.] filed an affidavit describing the complainant's and third-party's statements to the police. The Crown did not dispute Mr. [D.]'s descriptions at the stage one hearing but did at stage two. He provided in his submissions another description of the complainant's and third-party's statements to police.

[21] I was not provided a copy of the complainant's or third-party's statements. It is therefore difficult to assess the extent to which the complainant's descriptions of the alleged sexual assault are different and different from the third-party's statements. It seems to me that, as counsel disagreed about the importance of the inconsistencies in the complainant's and third-party's statements, it would have been useful to file the statements themselves.

[22] Nevertheless, based on the information I have, I can conclude that with regard to the inconsistencies in the complainant's statements, while there are differences in the descriptions, particularly of what Mr. [D.] was doing, there are also similarities. The complainant also gave the second statement several months after the first, which could explain some of these differences. The inconsistencies are not so starkly different as depicted by Mr. [D.]'s counsel at the stage one hearing.

[23] Similarly, the third-party's statement is not truly inconsistent with the complainant's statement. Rather, it appears that he slept through much of the alleged incident and has an unclear memory of the events in general.

[24] The reason the nature of the inconsistencies is important is because they provide the foundation for advancing the theory that the complainant imagined the assault. Two completely different versions told in short succession and contradicted by a third party may provide the basis for suggesting the complainant hallucinated or imagined a sexual assault. Where the inconsistencies are less significant and there are credible alternative explanations for the inconsistencies, however, the theory that the complainant hallucinated becomes less plausible. The probative value of evidence that supports that explanation also diminishes.

[25] Mr. [D.] also suggests that the complainant's consumption of alcohol and illicit drugs caused her to hallucinate or imagine the assaults. The evidence Mr. [D.] provides in support of this suggestion is, however, limited. He states only that she consumed significant amounts of alcohol and drugs that evening and that the complainant told the police she drank until 6 a.m. that day. While there are instances where, because of a person's consumption of drugs and alcohol they will hallucinate, without better evidence the theory here is not strong.

[26] Finally, as noted by the Crown and the complainant's counsel, Mr. [D.]'s description of the consensual sexual activity is quite different than the allegations of sexual assault. Because the nature of the consensual sexual activity is different than the alleged sexual assault, the theory that the complainant transposed the events of the afternoon into a hallucination becomes even less probable.

[27] Mr. [D.] seeks to adduce evidence of another sexual activity in support of a theory that does not have a strong foundation. The probative value of the evidence is not, therefore, high.

[28] There are instances in which the court admits evidence of other sexual activity where the defendant seeks to establish that the complainant may have imagined the sexual assault. In those instances, however, there was an extra element supporting the defendant's position.

[29] Thus, for example, in one instance, the complainant herself stated that she may have intermingled memories of past consensual sexual activities with her memories of the alleged sexual assault (*R v Boyle*, 2019 ONCJ 240 ("*Boyle*")).

[30] In another case, the complainant alleged that the defendant sexually assaulted her at night while she was asleep. The defendant wanted to adduce evidence that the complainant had been sexually assaulted before and, as a result, had recurring nightmares about being sexually assaulted that she reported to him seemed real and like it was happening again (*R v JM*, 2020 NSSC 321 ("*JM*")). This evidence was proposed to support the defendant's theory that the alleged sexual assault was a nightmare. Unlike *Boyle* and *JM*, the suggestion here has no grounding in the evidence in the record.

[31] Complainant's counsel also submitted that the facts upon which Mr. [D.] bases his theory are not unusual. Sexual assault allegations in which the defendant and complainant had previous consensual sexual activity, where the complainant drank and used drugs shortly before the alleged sexual assault, and where there are inconsistencies in the complainant's statement are not uncommon. Complainant's

counsel argues that if evidence of prior sexual activity were admitted here it would open the door to admitting the evidence in any number of similar cases. The result would be that s. 276 would be deprived of its purpose.

[32] I agree with the submission. Taking all the factors in s. 276(3) into account, I conclude that the evidence is not admissible pursuant to s. 276. I deny Mr. [D.]'s application.

[33] Under s. 278.95 of the *Criminal Code*, this decision may not be published unless, after taking into account the complainant's rights to privacy and interests of justice, I order that it may be published. The complainant's rights to privacy would be affected by the publication of the decision. Although I try to not include many details of my decisions on these issues, in this case that was inevitable.

[34] On the other hand, the issues raised in this application, while unusual, do arise from time to time. It may be that this decision may be of assistance in other cases. I will therefore permit that the decision be published, broadcast, or transmitted after the outcome of the trial.

WENCKEBACH J.