

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

HER MAJESTY THE QUEEN

AND:

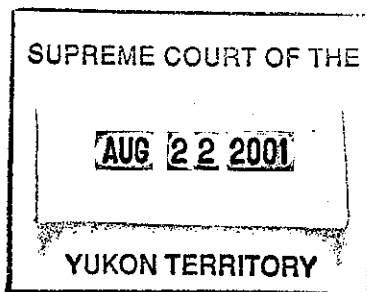
ANTHONY JAMES JOHNSTON

KEITH PARKKARI

Appearing for Crown

MALCOLM CAMPBELL

Appearing for Defence



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MEMORANDUM OF RULING  
DELIVERED FROM THE BENCH

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[1] WONG J. (Oral):

The accused, Anthony James

Johnston, is charged that between the 1st of December, 1993, and the 31st of January, 1994, at Haines Junction, he did commit sexual assault on one Crystal Sadie Joe.

[2] Charges were not laid until the late fall of 1999, and the complainant died in a motor vehicle accident in November 1999. The Crown is attempting under the circumstances to lead a number of out-of-court statements that the deceased made to a number of persons; the latest one being in July of 1999 to a Constable

Telep. That is the only full statement giving a narrative of the complainant's version of events.

[3] The evidence heard during the *voir dire* discloses, in essence, the following: In January of 1994, during the trials for the Arctic Winter Games in Haines Junction, the deceased, Ms. Joe, met the accused, Johnston, at a party at the Elders' Lodge. There was group drinking going on, and persons became quite intoxicated. At one point in the evening, a number of the deceased's friends decided to go to Margaret O'Brien's residence, which was a two to five-minute walk away. They stayed at the second place to consume some more alcohol for a half hour to an hour. They realized that they should check on Crystal, who was still at the Elders' Lodge. When they returned, two of the Crown witnesses, namely, Suzanne Hume and Margaret O'Brien, entered a bedroom, where the accused was clearly engaged in sexual intercourse with Crystal Joe.

[4] Crystal at that time was 15 years of age, as were her friends with whom she was at the party. It was clear that Crystal was grossly intoxicated. Margaret O'Brien directed that the accused get off Crystal, and Margaret and Suzanne then assisted Crystal in getting dressed. Evidence was led that Crystal was so intoxicated that she had to be assisted by each of the girls at her side to take her home.

[5] The next day, Margaret and Suzanne confronted Crystal about the incident. It is clear from the evidence given by both of these witnesses that Crystal's

recollection appeared to be vague, and Margaret and Suzanne had to relate or fill in some of the background as to what they observed, whereupon Crystal immediately said that it was rape.

[6] According to the evidence given by Margaret O'Brien during cross-examination, she said that when she entered into the bedroom where the accused and Crystal were found, she turned on the lights and they were under the blankets. She said "get off of her," at least on two occasions, which caused the accused to get up and leave. However, before he did so, as instructed, he had told Margaret to leave him and Crystal alone when they initially came in.

[7] Margaret O'Brien related that Crystal was very drunk and did not seem to know what was going on. The next day she told Crystal what had happened the night before, and Crystal did not remember all of the details, just some of them, and what she did remember she related to Margaret, that she, Crystal, was talking to the accused and that he was hitting on her and she said no, but she does not remember anything after that, and shortly thereafter refused to talk about the incident anymore, made the girls promise not to relate it to anyone, and that she did not wish to go to the police.

[8] Some years later, in speaking to Suzanne and Margaret on separate occasions, Crystal related that she was very upset that it happened. She wanted to be a virgin until she got married, and did not care and said that it did not mean anything to her any more. I think by implication it is clear that she was referring

to the incident at Haines Junction in January of 1994. However, this was only brought up on one or two occasions. In late 1999, Crystal approached both Suzanne and Margaret on separate occasions and asked if they remembered the incident, referring to the incident in Haines Junction, and asked if they would be witnesses. Crystal also told both women that she had also reported it to the police.

[9] In July of 1999, Crystal notified the police that she wished to press charges. After a number of attempts, Constable Telep finally managed to arrange for Crystal to attend at the police station. Constable Telep's evidence is that Crystal was very upset and did not want to be videotaped. As a result, Constable Telep took down an oral verbatim statement, which she handwrote, which was filed as Exhibit 1 during the *voir dire*. She said that Crystal cried throughout the interview.

[10] Constable Telep, at that time, in respecting Crystal's wish not to be videotaped, did not videotape the interview nor, for some reason, did she take what is now known as a *K.G.B.* statement, namely a statement taken under oath. As I mentioned earlier, that is the only time that Crystal gave a full disclosure of what took place, according to her recollection, that evening.

[11] The law is clear, as outlined by Mr. Justice Major in a very succinct statement in *R. v. R.(D.)* (1996), 2 S.C.R. 291, paragraph 34:

...It is not necessary that the statements be absolutely reliable, but a circumstantial guarantee of trustworthiness must be established in order for the statements to be admitted. The statements will be inadmissible where the hearsay evidence is equally consistent with other hypotheses.

[12] Other directions from the Supreme Court of Canada have also indicated that each statement is to be treated separately unless there is a connecting thread which is important to the unfolding of the narrative. However, care must be taken that separate statements are not used to corroborate other statements, either earlier or later.

[13] Following those particular directions, I will deal with the statements in turn. With respect to the statement that Crystal made throughout these times, it is quite clear that because Crystal is now deceased there is no real issue as to the requirement of necessity. She is now deceased and there is no other way to adduce her version of events. That leaves only the question of reliability on the threshold basis.

[14] With respect to the first statement, which was given the following day, from the evidence, Crystal was hung over. She was unwell but apparently had sobered up considerably from the evening before. There is evidence given that, when told what the other two girls had observed, she immediately said that it was rape. She also related, as I have indicated in the evidence given by Margaret O'Brien, that earlier she was hit upon by the accused, that she did not remember all of the details, just some of it, but she specifically remembered that she was

talking to the accused, he was hitting on her, and she said no; and she does not remember anything after that.

[15] Defence counsel has submitted that, circumstantially, on the observations of Suzanne Hume and Margaret O'Brien, the evidence appears to be consistent with consensual sexual intercourse. I must say that without the statements given the following day, that appears to be so. However, there is the element of spontaneity. When confronted with that aspect, Crystal said it was rape, implying that she was sexually taken advantage of, although she did not go into the details.

[16] The subsequent statements taken over the years merely are an expression, in my view, of Crystal's feelings about the incident, but it does not, on the face of it, inculcate the accused on the question of nonconsent. It merely expresses the regret and the turmoil experienced by Crystal.

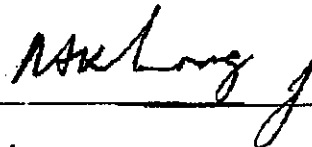
[17] Dealing with Constable Telep's statement, that was taken some five years later when, for some reason, Crystal decided then to disclose it to the authorities. It is the only time that she gives details as to what took place, including that to which she could not recall the next day after she had sobered up.

[18] With respect to the first statement, taking into account the aspect of contemporaneity and the fact that it was spontaneous the day following the incident, I am of the view that that statement satisfies the threshold of some

reliability to enable it to be admitted. I am also of the view that that evidence overrides the initial impression that the incident was equivocal, inasmuch as it lends it more likely than not, from her statement, that she was sexually taken advantage of while being intoxicated.

[19] As to the final statement given to Constable Telep, in my view, that is problematic in light of the fact that it is for the first time that details are related, especially when Crystal could not recall the details the following day, having sobered up somewhat. Also, difficulties in her refusal to permit videotaping, and she has given considerable detail where some of those details were earlier related to her by her friends. I think that, under those circumstances, the reliability is questionable, especially after this lapse of time.

[20] For those reasons, in my view, the only statement that is admissible is the conversation with Suzanne Hume and Margaret O'Brien the following day. The other statements, in my view, do not pass the initial threshold requirement and therefore will be excluded.



WONG J.