

Citation: *R. v. Buyck*, 2018 YKTC 1

Date: 20180109
Docket: 13-00373A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Chief Judge Ruddy

REGINA

v.

ROY KENNETH BUYCK

Appearances:
Ludovic Gouaillier
Roy Buyck

Counsel for the Crown
Appearing on his own behalf

FINDINGS OF FACT ON *GARDINER* HEARING

[1] On June 20, 2017, I received a memorandum from the Registrar of the Yukon Court of Appeal conveying the Court's direction that a judge of the Territorial Court of Yukon be assigned as a special commissioner to conduct a *Gardiner* hearing (*R. v. Gardiner*, [1982] 2 S.C.R. 368) and to report back to the Court of Appeal all of the proven facts. Given the time it has taken to resolve this matter, I felt it appropriate to include a brief overview of the evolution of the *Gardiner* hearing.

[2] The hearing was set to October 11 and 12, 2017 as the earliest dates available to accommodate counsel's schedules. On October 11, 2017, the victim, J.H., testified, on consent, by CCTV. After the morning break, counsel for Mr. Buyck made application to be removed as counsel of record on the basis of a breakdown in the solicitor/client

relationship. The application was granted. Crown was given leave to complete the direct examination of J.H., which consisted of one additional question. I ordered a transcript of the evidence in chief to be prepared and provided to all parties. The matter was adjourned to October 20, 2017 to allow Mr. Buyck to retain counsel.

[3] On October 20, 2017, Mr. Buyck sought additional time to secure counsel, indicating that he had an appointment with Legal Aid on October 24, 2017. The matter was adjourned to October 30, 2017.

[4] On October 30, 2017, Mr. Buyck indicated that he had not been successful in retaining counsel to assist him, though efforts were ongoing. Given concerns about time, I ordered, with Mr. Buyck's consent, that counsel be appointed to conduct the cross-examination, in the event Mr. Buyck was not successful in retaining counsel, and set the matter to November 29, 2017 for continuation.

[5] On November 29, Mr. Buyck had still not been able to retain counsel. Mr. Bibhas Vaze appeared pursuant to my order and conducted the cross-examination of J.H. Mr. Buyck agreed to the admission of the report of the DNA expert, which had been served upon him per s. 657.3 of the *Criminal Code*. Crown rested its case.

[6] Mr. Buyck was asked if he wished to call evidence. He was advised that he was not required to call evidence and that I could not draw any adverse inferences should he choose not to, but he indicated a desire to tell 'his side of the story'. Based on comments Mr. Buyck made on the record, but not under oath, I was concerned that testifying may not be in his best interests, and he was strongly encouraged to seek legal advice before making his decision. I ordered that he be provided a CD of the cross-

examination that, along with the transcript of the direct examination, would allow him to review the complainant's evidence with counsel. The matter was adjourned to December 15, 2017.

[7] Mr. Buyck, a resident of Mayo, was unable to attend court in Whitehorse in person on December 15, 2017 due to dangerous road conditions. However, he appeared by telephone and advised that he did wish to testify on his own behalf, and the matter was adjourned to January 3, 2018 for Mr. Buyck to call evidence.

[8] On January 3, 2018, Mr. Buyck indicated that he had reconsidered his decision and elected not to call evidence on the *Gardiner* hearing. Following submissions with respect to the facts established in the *Gardiner* hearing, I indicated that I would forward written reasons with respect to my findings to the Court of Appeal and to the parties by January 12, 2018.

[9] With respect to the facts established on the *Gardiner* hearing, I would make the following comments with respect to the credibility of the evidence of J.H. It was clear to me that J.H. was extremely unhappy to be called to testify. This manifested in periodic outbursts and refusals to continue participating in the process. Fortunately, following breaks, J.H. was, ultimately, able to complete her evidence.

[10] It was also clear that J.H.'s memory was severely compromised by the consumption of alcohol on the night of the sexual assault. The level of detail of her evidence was extremely limited, and she had little to no recollection of the events leading to the sexual assault. However, she was unshaken on her evidence of what

she did remember and I find that her evidence was entirely credible, notwithstanding these frailties.

[11] Based on her evidence, I make the following findings of fact:

1. On an evening in August of 2013, J.H. encountered Mr. Buyck in Whitehorse, Yukon, and he invited her to drink with him and his cousin, Archie, in Mr. Buyck's room at the Yukon Inn.
2. J.H. had been drinking alcohol over the course of the day and was 'buzzed' when she met Mr. Buyck although not yet intoxicated.
3. In the hotel room, the three individuals consumed a 26 ounce bottle of vodka, of which J.H. consumed half.
4. J.H. passed out in a chair as a result of the consumption of alcohol.
5. When J.H. woke, she was on the bed and her pants and underwear had been removed.
6. Mr. Buyck was "fingering" her, which is to say that he had his finger in her vagina.
7. J.H. "freaked out" and began looking for her pants and underwear. She could only find her pants, which she put on.
8. J.H. left the Yukon Inn and went to detox where she told staff what had happened.
9. J.H. went to the hospital where a sexual assault kit was done.

[12] I am satisfied beyond a reasonable doubt that J.H. did not consent to sexual activity with Mr. Buyck. Indeed, I am satisfied that J.H.'s state of intoxication was such that she lacked the capacity to consent to sexual activity.

[13] In addition to J.H.'s testimony, the evidence includes the DNA report filed as Exhibit 1. Based on the report, which was not challenged, I find as a fact, that Mr. Buyck's spermatozoa was found on J.H.'s jeans and on two vaginal swab samples from J.H.

[14] However, the Crown also argued that the DNA report provides strong circumstantial evidence sufficient to establish that non-consensual intercourse occurred in addition to the digital penetration that J.H. is able to recall, arguing that intercourse would be the only way in which the sperm could have been found in J.H.'s vagina.

[15] With respect, I am not satisfied, on the evidence before me, that intercourse would be the only reasonable explanation for the sperm found on the vaginal swabs. It is also possible, and consistent with the evidence of J.H., that Mr. Buyck's hand had come into contact with his own sperm before he digitally penetrated J.H. Given the existence of at least this other reasonable explanation, and the lack of any expert evidence that would persuade me that intercourse is the only possible explanation for the sperm on the vaginal swabs, I conclude that I cannot find, beyond a reasonable doubt, that non-consensual intercourse formed part of the sexual assault.

RUDDY C.J.T.C.