

Citation: *R. v. J.S.*, 2016 YKTC 63

Date: 20161215
Docket: 15-03597
Registry: Whitehorse

YOUTH JUSTICE COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

J.S.

Publication of information identifying the young person charged under the *Youth Criminal Justice Act* is prohibited by section 110(1) of that *Act*.

Publication of information that could identify the complainant or a witness is prohibited by section 111(1) of the *Youth Criminal Justice Act*. Check with the court registry for details.

Appearances:
Leo Lane
Amy Steele

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] J.S. has been tried on allegations that on February 29, 2016, he committed the offences of sexual assault and unlawful confinement, contrary to s. 271 and s. 279(2) of the *Criminal Code*, against the complainant, G.I.

[2] G.I. testified that she had never met J.S. prior to the date of the alleged incident.

[3] G.I. stated that the evening before the alleged incident she had gone to the hospital because of some arthritic pain in her shoulder from a broken collarbone. She

returned home just before midnight. A friend, C.B., came over and asked G.I. to come back to her house for a drink. C.B.'s residence was across the street. C.B. came over within five minutes of G.I. arriving home from the hospital.

[4] G.I. stated that she told C.B. that she would come over but she couldn't drink because she had been given some pills at the hospital for her shoulder.

[5] G.I. stated that when she arrived at C.B.'s residence, J.S. was there. C.B. introduced him as her cousin J. initially, providing his last name later. G.I. was not certain whether anyone else was there. She did not recall C.B.'s boyfriend being there but acknowledged that he may have been.

[6] G.I. stated that the three of them were listening to music and smoking in the back bedroom of the trailer unit, which she referred to as the smoking room. There were a table and chairs in the smoking room. She believed that C.B. and J.S. were drinking from a 26 oz. bottle of Smirnoff vodka. G.I. stated that she was drinking Pepsi and water.

[7] G.I. testified in cross-examination that earlier in the morning of February 29, after she had come over to C.B.'s residence, and while in the kitchen, J.S. had tried to kiss her and put his hands in her pants but she pulled away. She denied ever touching J.S.

[8] G.I. testified that at one point C.B. accused J.S. of stealing her glasses. She agreed that C.B. was angry and that she was friends with C.B. She further agreed that she would defend C.B. and that she was upset with J.S. about him perhaps stealing C.B.'s glasses.

[9] G.I. said that C.B. left to go to bed. She stated that at one point she was talking to C.B. in her bedroom for about five minutes. She and J.S. then shared a smoke and kept talking. She was not sure for how long. G.I. told J.S. that she was tired and was going to go to sleep. He told her to stay longer or he would be bored. She stayed longer and shared another smoke with J.S. She then went to the porch by the front door and put on her shoes to leave, as well as the blanket she wore over when she came instead of a coat. She was also wearing pyjama bottoms and a red shirt. She said that J.S. was lying down on the couch with his eyes closed as she went to leave.

[10] J.S. came over and told her not to leave. He then stated that he wanted to have sex with her. She told him no repeatedly. Regardless, J.S. picked her up and carried her over to the couch in the living room. G.I. stated that she weighed 104 lbs. at the time and that J.S. was bigger than her.

[11] While G.I. was lying down on the couch on her back J.S. pulled off her pyjama bottoms. He then pulled his hard penis out of his pants. She tried to get up and put her pyjamas on to leave but J.S. stopped her. He pulled her back and inserted his penis into her vagina. This continued for some time, perhaps 15 minutes. She stated that she felt pain and that she tried to get up to leave. She testified that she was telling J.S. that she did not want to do it. In direct examination she stated that she was on top but in cross-examination she stated that J.S. was on top.

[12] G.I. stated that she was finally able to get up and put her pyjamas back on. She went to the porch by the door and tried to put her shoes back on. She was only able to get one shoe on. J.S. placed himself between G.I. and the door. She tried to leave but

she was unable to because he was stopping her. She stated that she was trying to push past him but she was too small. J.S. was saying that he wanted to keep going. J.S. then carried her back to the couch where they talked for a bit. She said that she told J.S. she didn't want to do it. She was trying to find out how old he was. She thought he was around 15. J.S. would not tell her his age.

[13] G.I., who was sitting on the couch with J.S. at the time, tried to get up and leave again but J.S. again pulled her back onto the couch and took off her pyjamas. He pulled his pants down to mid-thigh and had sex with her. She said this time it lasted about 10 minutes. He did not have a condom on. In direct examination she stated that J.S. was on top but in cross-examination she stated that she was on top.

[14] G.I. was then able to get up and put her pyjamas back on. She made it to the door. J.S. told her to come back, but she said no. He was close to her at this time. He grabbed her hand and took her back to the couch where he had sex with her for another approximately five minutes. In cross-examination she stated that she was on top at the time.

[15] After this final incident of sexual intercourse, G.I. was able to leave the residence. J.S. left with her and came to her house to ask to use the phone in order to get a ride. There was no phone at C.B.'s residence. G.I. brought a phone outside to J.S. who was able to contact someone. She got the phone back and went into her house to sleep. J.S. walked off down the street.

[16] G.I. stated that she had pain in her vaginal area for a few days. She did not tell anyone what happened for several days, until she contacted her ex-best friend through

Facebook. This friend told her to go to the hospital, which she did with her mother and boyfriend. She then went to the RCMP and told them what happened.

[17] G.I. stated that she attended at the hospital for a sexual assault examination on March 16 and then attended at the RCMP afterwards where she provided a statement.

[18] G.I. identified J.S. from a photo lineup. She said that she had no difficulty in doing so, noting in her testimony that he had longer hair in the photo than at the time of this trial. (I note that although G.I. testified by CCTV from outside the courtroom, the initial portion of her testimony was given while she was able to see J.S. This was subsequently corrected so that she was unable to see him).

[19] G.I. stated that she had seen J.S. several times since that date but only walking around. She never had any further direct contact with him.

[20] J.S. testified. He provided details of his activities earlier the evening before and that day. He stated that he and C.B. were at her residence drinking from a 26 oz bottle of vodka. He stated that he was “really, really drunk”, blacking in and out for short periods. He agreed that he would generally be able to do things and function while being in a “blacked-out” state.

[21] Initially J.S. was drinking in the back bedroom with C.B. and her boyfriend. He remembered that at some point the boyfriend got up and left the room and did not come back. At one point C.B. brought over a friend. He hadn’t met this friend before. He agreed that this friend could be G.I. They were sitting around the table smoking. He remembers an argument with C.B. over her accusations that he had stolen her glasses

and wallet. The last thing that J.S. remembers is this argument. He stated that he remembers nothing that happened after that until he woke up later in bed at his group home. He stated that he had no recollection as to whether he had had sex earlier.

[22] Counsel for J.S. acknowledges in her submissions that there is nothing in the testimony of J.S. that provides any affirmative defence to the charges he faces.

[23] Rather, counsel submits that J.S. should be acquitted on the basis of the unreliability of the testimony of G.I.

[24] Counsel points to the following issues:

- G.I. testified that she went over to C.B.'s residence the same evening that she returned from a visit to the hospital, and that the sexual assault occurred in the early morning hours after. She testified that the sexual assault occurred on March 2, 2016, and probably on a Friday or a Saturday. In fact, the evidence shows that the visit to the hospital was on February 28, 2016, and the following morning, February 29, was a Monday.
- G.I. was unsure whether C.B.'s boyfriend was present.
- G.I. testified to having memory issues, in general.
- In cross-examination, G.I. was not certain what words were exchanged at the door of C.B.'s residence in regard to her testimony that J.S. stated he wanted to have sex with her.
- G.I.'s testimony was inconsistent with respect to whether she or J.S. was on top during the alleged sexual assault. Counsel also argued that it would be difficult for J.S. to have been sexually assaulting G.I. with forced intercourse if G.I. was on top.
- It would have been challenging for J.S. to have been sexually assaulting G.I. with forcible intercourse if his pants were still on during the alleged first instance of sexual assault described. She noted that in G.I.'s original statement to the RCMP she had said that J.S.' pants were on during this first instance of sexual assault.

- G.I. did not run away, lock herself in the bathroom or call out for help, despite C.B. being asleep nearby in a bedroom.
- It would have been unusual for G.I. to have simply walked across the street with J.S. after three such incidents of forced sexual intercourse, go into her house in order to obtain a phone for him to use to call for a ride and not report the sexual assaults immediately to her mother or her mother's boyfriend, who were in the house when she returned from C.B.'s residence. Counsel submits that G.I. would have been traumatized by the sexual assaults if they occurred as she testified to and thus would not have acted afterwards in the manner that she described. This stated, counsel agrees that there is not any "right way" for the victim of a sexual assault to act both during and after a sexual assault.

[25] Counsel submits that G.I. may be alleging the occurrence of the sexual assault because she regretted having had sex with the 15-year-old J.S. Counsel also mentioned in her submissions that G.I. was a friend of C.B. and may have been trying to support her in regard to the argument about the sunglasses and the wallet. I gather from this submission that counsel was perhaps asking me to infer that G.I. therefore made up the story about the alleged sexual assault as a result.

[26] Crown counsel submits that none of the concerns raised by counsel for J.S. are sufficient to impact in any meaningful way the testimony of G.I., which Crown submits is credible and reliable and forms a sufficient basis to find that J.S. committed the offences with which he has been charged, beyond any reasonable doubt.

[27] As J.S. testified, I must consider the application of the test as set out in **R. v. W.D.**, [1991] 1 S.C.R. 742 at p. 758 (para. 28 QL):

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in a reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[28] There is nothing in the testimony of J.S. that offers any meaningfully different version of events than that testified to by G.I., or challenges the credibility or reliability of her testimony. Simply put, the testimony of J.S. even if believed in its entirety, does not raise a reasonable doubt. To the extent that J.S. testified to matters that he had any recollection of, his testimony is either consistent, or at least not inconsistent, with the testimony of G.I.

[29] The question therefore, is whether there is anything internally inconsistent in the testimony of G.I. or whether there is external reliable evidence that undermines the credibility or reliability of G.S.

[30] In my opinion there is not.

[31] G.I. testified by CCTV from outside the courtroom following a successful Crown application. Reasons for my order that she be permitted to do so are set out in **R. v. J.S.**, 2016 YKTC 59. I find that G.I. was a compelling witness. In my opinion she testified in a clear and forthright manner. She was not evasive or hostile. She provided a fairly simple description of the events of that evening and morning. I am aware of the caution that must be given when assessing the credibility and reliability of a witness and when considering the demeanour of the witness in doing so. Demeanour can be an unreliable tool and so it must be weighted carefully. This said, there was nothing in the

demeanour of G.I. that causes me any concern or to question the reliability and credibility of her evidence.

[32] G.I. was clear and unequivocal in her testimony that she went over to C.B.'s after visiting the hospital and that the incident occurred in the early morning hours afterwards. I find that G.I.'s statement to the RCMP that the incident occurred March 2 and on a Friday or Saturday does not impact negatively upon her credibility. She stated that she was not particularly aware of dates around that point in time.

[33] I am satisfied that the incident occurred during the early morning hours of February 29. I accept G.I.'s testimony that the incident occurred the morning after she went to the hospital. The documentation from the hospital indicates this to be on February 29. It is clear from this documentation that G.I. attended the hospital on February 28, which is a Sunday night. I have no reason to believe that G.I. attended at the hospital around that time on another occasion in respect to her concerns about pain from her collarbone. I am satisfied on the evidence that the incident testified to took place on the morning of February 29, which is close to the weekend.

[34] The testimony from G.I. that she did not know whether C.B.'s boyfriend was present does not challenge her credibility or reliability in any way. He may have been there earlier and left before G.I. arrived. Prior to his blacking out, J.S. testified that this boyfriend was there with he and C.B., but that the boyfriend left at some point. This may have been what happened and it could have taken place before G.I. arrived. Regardless, it would appear that the boyfriend's role, if any, in what occurred would have been minimal at best.

[35] G.I.'s testimony that she has memory issues in general does not mean that I should doubt her ability to remember what happened in the early morning hours of February 29. G.I. did not testify that she was having trouble remembering the details of the incident and I did not observe her struggling during her testimony with any memory issues in that regard. To the contrary, she testified that she recalled what took place. G.I. stated in cross-examination that she had been trying to forget what had happened but talking about the incident was helping to get her memory back. While stating that she has incurred a number of head injuries (she lost count after 15) that affect her memory, G.I. stated that these injuries had no impact on her memory of what occurred in regard to the incident. She testified that she recalls what took place because she was sober and in a lot of pain at the time.

[36] I also have no concerns about G.I.'s testimony in cross-examination that she could not be sure exactly what words were said at the door when she was trying to leave. She testified that J.S. said that he wanted to have sex and that he picked her up and carried her to the couch, despite her saying no to him. I do not have concerns that there were other things stated that would have somehow meant that G.I. was indicating to J.S. her consent to have sex with him.

[37] I also do not share counsel's concerns that G.I.'s testimony as to who was on top during the acts of sexual intercourse compromise her testimony that these acts occurred. She was clear that there were three separate instances of sexual intercourse, none of which she was consenting to. I also do not consider that forced sexual intercourse is implausible if G.I. was on top of J.S. She is much smaller than J.S. and, while the ability to which he would have been able to restrain her on top of him as

contrasted to underneath him, would likely have been different, that does not mean it is unlikely to have been possible or to have occurred.

[38] I also do not share counsel's concern that the first instance of forced sexual intercourse could not have happened if J.S.'s pants were on. G.I. stated that he took his penis out and it was hard. Whether this was because J.S. simply opened his fly, or had his pants open but not down, were not questions clearly put to G.I. While I cannot speculate as to what G.I. meant, I do not see her testimony in this regard as putting her credibility and the reliability of her evidence in question.

[39] I also am not concerned about the fact that G.I. did not yell out for C.B., scream, run away, or tell her mother right away about being assaulted. Nor am I troubled by the evidence that she walked over to her house with J.S. afterwards in order to let him use her phone, and delayed in going to the hospital and reporting the incident to the police. These facts do not necessarily make her testimony less credible and reliable, although they are all factors I must consider carefully along with the balance of the evidence presented.

[40] There is no "right way" for the victim of a sexual assault to act during or after a sexual assault, including one in which forced intercourse is part of the incident. As stated by Horkins J. in *R. v. Ghomeshi*, 2016 ONCJ 155 in para 135:

As I have stated more than once, the courts must be very cautious in assessing the evidence of complainants in sexual assault and abuse cases. Courts must guard against applying false stereotypes concerning the expected conduct of complainants. I have a firm understanding that the reasonableness of reactive human behaviour in the dynamics of a relationship can be variable and unpredictable. However, the twists and turns of the complainants' evidence in this trial, illustrate the need to be

vigilant in avoiding the equally dangerous false assumption that sexual assault complainants are always truthful. Each individual and each unique factual scenario must be assessed according to their own particular circumstances.

[41] Explanations were given by G.I. for why she did not call out for C.B. or tell her mother. G.I. testified that her mother's boyfriend would have been mad if she had woken him up. G.I. stated that she finally decided to tell her mother and go to the hospital because she was tired of being afraid.

[42] G.I. stated that she didn't tell C.B. about the assault because she felt uncomfortable doing so and felt that C.B. would hold it against her. She did not want to let C.B. know about it.

[43] No explanations were offered for some of the other ways in which G.I. acted. The question for me, though, is not whether these actions or inactions by G.I. were objectively reasonable in the situation, or what G.I. could or should have done, or what others may have done. The question is whether the evidence of G.I., assessed in the context of the whole of the evidence, is capable of being believed and of displacing the presumption of the innocence of J.S. and proving beyond a reasonable doubt that the offences occurred.

[44] It was apparent to me that G.I. was not a particularly sophisticated witness. Her responses to the questions were simple and straightforward. There was no evasiveness, hostility, or hesitation in how she responded to the questions that she was asked. She appeared to me to be just answering questions in as truthful a manner as

she could. In all the circumstances, I find her testimony was that of someone trying her best to be honest and truthful.

[45] To the extent that J.S. was able to testify and recall events, his testimony was essentially consistent with that of G.I.

[46] Therefore, when G.I. testified as to what she did or did not do, and as to what J.S. did, I find her to be credible and her testimony to be reliable.

[47] On the basis of my acceptance of the testimony of G.I., I therefore find J.S. guilty of the offence of sexual assault.

[48] Further, I am satisfied that the testimony of G.I. establishes that she was prevented from leaving the residence by the physical intervention of J.S. and as such the offence of unlawful confinement is also made out and he is convicted of that charge as well.

COZENS T.C.J.