Citation: *R. v. Kodwat*, 2016 YKTC 58

Date: 20161026
Docket: 15-00616
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Luther

REGINA

v.

JACKIE JAMES KODWAT

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:
Susan E. Bogle — Counsel for the Crown
Vincent Larochelle — Counsel for the Defence

REASONS FOR JUDGMENT

[1] LUTHER J. (Oral): The accused, Jackie James Kodwat, was charged on December 20, 2015, at the City of Whitehorse, in the Yukon Territory, committing a sexual assault on A.G., contrary to s. 271 of the *Criminal Code*. The Crown proceeded by indictment.

[2] I was pleased to hear that the accused has been sober for over five years and that there was no evidence of alcohol consumption at the time of the alleged offence, although there was some reference to marijuana. That does not bear in any significant way on the outcome of this case.

[3] The accused turned 45 the day before the alleged offence. He weighs 210 pounds and is 5 foot 9 inches. The complainant was 17 years old, weighed 120 pounds, and is 5 feet 5 inches.

[4] The accused had unprotected sexual intercourse with A.G., including ejaculation, around 4 a.m. The only issue is consent. He claims it was clear and unequivocal. According to him, it was very simple. He asked her if it was okay to kiss her, she agreed verbally, and then he asked to have sex. Again, she agreed verbally.

[5] A.G., after drinking alcohol at the college, took a cab with two other young people, J. and T., to his grandparents' residence in the McIntyre subdivision of Whitehorse. A.G. was quite tired but did not remain there, as the house was full and also the room she was to stay in was occupied by her two friends, who were in the process of making out. She felt uncomfortable. She left this residence and headed towards a residence where her friend D.C. lived.

[6] A.G. was very tired. There were numerous references to A.G. being tired. Her priority was to get shelter and to go to sleep. She testified that she was drunk. Despite her age, she did have experience drinking.

[7] The Digital Audio Recording System (DARS) system of the court has been helpful to all of us in a review of this case. Defence counsel skillfully and thoroughly canvassed all areas which might impact especially on the credibility of the complainant.

[8] There are a number of peripheral matters in dispute. A.G.'s evidence on some of these matters is at divergence with evidence from D.C., the accused, and the accused's mother, Elsie Charlie. Some of these points include:

1. Did the accused know A.G. before? Did she know him then?
2. How did she arrive and gain entrance to the accused's residence?
3. How many times did she wake up that morning?
4. Who phoned the hospital?
5. Was there marijuana on the bed or nightstand?
6. Did the accused's mother, Elsie Charlie, leave for bingo before A.G. left?
7. Was A.G. underdressed for the cold weather?
8. Was A.G. drunk?

[9] Points 4 through 7 are not particularly important in this case, neither in terms of credibility nor result. These are best classified as peripheral matters. Similarly, the lack of physical trauma is not determinative of anything, especially when the sexual experience was so short-lived. By physical trauma, I am talking about her vaginal area.

[10] I do accept the evidence of the accused that he did not cause the bruising on her legs. That was far more likely caused by an apparent fight at the college.

[11] As to Point 1, it is probable that the accused had met her four times primarily in relation to cigarettes and booze. The encounters were brief and A.G. was either

intoxicated or, quite simply, not paying attention to the accused. There was little or no interest in him. The accused remembered her, I accept that. I also accept that she did not remember him.

[12] As to Point 2, A.G. may have been mistaken about how she arrived at Elsie Charlie's house. Elsie Charlie may have temporarily and briefly been on the porch, but it is not her practice to stand out there for periods of time and smoke, especially in the cold weather. The more likely scenario is that A.G. was drunk and confused and knocked on the door quite loudly around 3 a.m. The accused let her in and led her to his bedroom, giving her a place to crash.

[13] As to Point 3, A.G. told the police at the hospital within just a few hours of her leaving the accused's house that she woke up twice, that is, at 8 a.m. and 9:44 a.m. A.G. claims it was only once, in her testimony, because she would not have stayed there once she had woken up. In my view, it is more likely that she partially woke up at 8 a.m. and dozed back to sleep until 9:44 a.m. In any event, as soon as she was alert, she made a quick exit after dressing and retrieving the contents of her purse.

[14] As to Point 8, A.G. had consumed alcohol before. We know that from the evidence of D.C. and from her own evidence. She knew that she was drunk. She had consumed between 5 and 13 ounces of vodka at the college. It is likely that she had not eaten three full meals that day. She has little or no memory of eating. I believe she had very little food in her stomach when drinking at the college.

[15] The accused stated that A.G. was not intoxicated, as he would not have let her in. I do not believe the accused would have turned her away from his door into the -19

or -20 degrees that it was at 3 a.m. that day. He could not smell alcohol on her breath; however, he also said that she did not seem too intoxicated. A.G. was consistent throughout her evidence that she was drunk and very tired. Those are two main themes of her evidence and I accept her evidence on that.

[16] The Court is well aware of the tests in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, and *R. v. Ay*, (1994), 59 B.C.A.C. 161. Furthermore, I am guided by *R. v. Sandhu*, 2012 BCCA 500, and *R. v. Jeng*, 2004 BCCA 464, wherein they accepted the application of an old civil case, *Faryna v. Chorny*, [1952] 2 D.L.R. 354, wherein it was stated (pp. 356-7):

> ... In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. ...

[17] In *Sandhu*, the Court allowed the appeal and ordered a new trial on the basis of, amongst other things, the many inconsistencies in the complainant's evidence. See paras. 25-28 of that decision.

[18] In *Jeng*, the Court also considered *Faryna v. Chorny* at para. 54 and dismissed the appeal.

[19] *Sandhu* also referenced *R. v. Dinardo*, 2008 SCC 24, reinforcing the importance of sufficiently articulating how credibility concerns were resolved.

[20] The accused has a three-page criminal record consisting of three sexual assaults, seven other assaults, and seven failure to comply with court orders or failing to appear. He acknowledged that he is familiar with the court process.

[21] Referring to a decision filed by the Crown, *Tremblay c. R.*, 2006 QCCA 75, the Quebec Court of Appeal referred to *R. v. Corbett*, [1988] 1 S.C.R. 670. In *Corbett*, Chief Justice Dickson explained the relevance of an accused's prior convictions to his or her credibility.

> 22. ... There can surely be little argument that a prior criminal record is a fact which, to some extent at least, bears upon the credibility of a witness. ...

[22] In *Tremblay*, at para. 18:

> Furthermore, persistent contempt for the law is relevant to assessing a witness' credibility. It may be inferred that an individual who repeatedly breaks the law has little respect for the truth and is therefore more likely to lie. ...

[23] My observation is that the accused gave his evidence in a straightforward manner and was not particularly shaken on cross-examination, despite various attacks taken by the Crown attorney. Other than on one or two brief periods, he was not rattled and remained smooth. His story was essentially consistent.

[24] The complainant was 17 years old and was uncomfortable being in court as a witness. That was clear to all of us. She gave her evidence via Closed Circuit Television (CCTV) and had support persons with her. They did not in any way act inappropriately nor influence her in any wrongful manner. A.G. placed her head down many times. She was clearly uncomfortable and distraught. She did not want to be

there. There were a few instances where her testimony was successfully challenged, but not on the key points dealing with consent.

[25] The accused said A.G. consented. She had, in his version, fallen asleep on a chair around 3 a.m. He finished watching the last hour of *Avatar* and, again, according to him, she awoke, perhaps due to discomfort, and wanted to sleep on the bed. He allowed her to do so. He lay down beside her and asked if he could kiss her. She said yes. They kissed for 20 to 25 minutes and then he asked if they could have sex. She said okay. He undressed her and himself, and had sex in the missionary position for about one minute. He admitted he had not had sex in a while. After this shortened experience, she rolled her eyes and fell asleep.

[26] Her story is that she remembers receiving a cup of water from him and that the TV was on. Her clothes were on, that is, two pairs of pants and underwear and a shirt. I do not recall any reference in the evidence as to a bra. She fell asleep in the chair. Once she awoke on the bed, her inner pants and underwear were around her ankles. The second pair of pants was on the floor. The accused was trying to pull her close to him and said something about her having a beautiful smile and white teeth. The accused gave her a red lumber jacket, which she had previously borrowed from J., as she was gathering her belongings and quickly left. Other than receiving the lumber jacket, she wanted absolutely nothing to do with him.

[27] Arriving at D.C.'s, she immediately burst into tears before D.C. mentioned anything about the accused luring drunken girls into his mother's house. Before that

statement by D.C., A.G. was already crying hysterically. Complaints were made immediately and the criminal justice system was engaged.

[28] There have been a number of developments in the law pertaining to credibility. I have already referenced *W.(D.)* and *Ay*. Furthermore, I would add that it is a good development in the law that judges are not determining credibility on the basis solely of demeanour nor a contest between the complainant and the accused. See *R. v. Wilson*, 2013 NBCA 38, *R. v. S.T.*, 2015 MBCA 36 and *R. v. M.D.R.*, 2015 ONCA 323.

[29] The evidence of the accused as to consent, I have to rule, is disbelieved. It is clearly self-serving coming from a repeat offender who is familiar with the court process. It has no air of reality and does not meet the test set out in *Faryna v. Chorny*, as commented on by subsequent British Columbia Court of Appeal decisions. It does not accord in any way with reasonable human behaviour for that time, place, and circumstance.

[30] It is inconceivable that an attractive 17-year-old girl would consent to kiss for 20 to 25 minutes and then have unprotected sexual intercourse with the accused who meant nothing to her and whom she did not remember — and furthermore, who was 28 years her senior. She had passed out from being drunk and overly tired. It is preposterous to think that she woke up when the movie was over and voluntarily kissed the accused for 20 to 25 minutes and then had unprotected sex with him. It defies any reasonable expectation of being believed.

[31] Even if the accused had no prior record, his evidence would still be disbelieved. It makes no sense at all. The 17-year-old complainant removed herself from his

residence as quickly as she could in the morning, and earlier had rebuffed the advance of this older man as he attempted to get close to her and compliment her on her smile and teeth. There was no attraction at 3 a.m., nor at 4 a.m., nor at 9:44 a.m. There was absolutely no consent at 4 a.m. to the removal of clothing, the kissing, or sexual intercourse.

[32] Her emotional state was obvious when she cried hysterically when she first saw her friend D.C.

[33] This is obviously not the same situation as existed in *R. v. Haraldson*, 2012 ABCA 147. This is not a case of:

> [7] ... alcohol-induced imprudent decision making, memory loss, loss of inhibition or self control: *R. v. Merritt*, [2004] O.J. No. 1295 (Ont. S.C.J.). ...

[34] In *Haraldson*, the judge with the sparsest of reasons, found that:

> [9] ...loss of memory is not conclusive of incapacity, nor is rationality conclusive of good decision making.
>
> ...
>
> ...there is a likelihood of legal consent and/or a reasonable basis for its honestly held belief."

[35] The facts in this instance are entirely different.

[36] In *Haraldson*, the respondent was with a willing and able third-party companion who planned to spend the night with him at his hotel. She was an active and engaged participant. The complainant appeared to be aware of her surroundings and voluntarily engaged in sexual activity, which was described in some detail in the decision. The

Crown failed to prove beyond a reasonable doubt "either an absence of capacity to consent, or consent in fact."

[37] A.G. had not remembered the accused from the three to four times he may have supplied her with booze or cigarettes. He was not important to her at all. There is no evidence whatsoever that she was ever physically or sexually attracted to him. A.G. simply wanted a place to stay, as she was drunk and confused and very tired.

[38] The accused gave her a place to crash, which she did; however, he could not resist the temptation and had his way with her while she was passed out. He had unprotected sexual intercourse with a 17-year-old girl who was drunk and very tired and passed out. The defence theory that she was ashamed and did not want to remember is rejected. She did not remember because she was passed out. It's as simple as that.

[39] As to *W.(D.)*, quite obviously, I do not believe the evidence of the accused and, thus, there is no reasonable doubt coming from his evidence. Furthermore, I am convinced beyond a reasonable doubt by the totality of the evidence of the guilt of the accused. Obviously, the case of *Ay* does not apply.

[40] In summary, I will just read briefly from a decision from Judge Cozens, *R. v. K.S.*, 2015 YKTC 23, at para. 78:

> The critical factor in assessing credibility in cases such as this is that there be a careful consideration of the entirety of the evidence, and that a finding of credibility in regard to the prosecution's witnesses or the complainant does not lead to a finding of incredibility or a rejection of the evidence of the accused. Even if a complainant is found to be credible and the complainant's evidence believable, it is still incumbent on the trier of fact to give careful consideration to the evidence

> of the accused and any other evidence, in other words the whole of the evidence that has been adduced, in order to see whether a reasonable doubt has been raised.

[41] And as to reasonable doubt, the Court is well aware of the leading cases of *R. v. Lifchus*, [1997] 3 S.C.R. 320; *R. v. Starr*, 2000 SCC 40; and *R. v. Kennedy*, 2015 NLCA 14.

[42] The Court registers a conviction on this charge.

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LUTHER T.C.J.