

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

REGINA

v.

OWEN MILLER

Restriction on publication: publication of information that could identify the complainant or a witness is prohibited pursuant to section 486.4 of the *Criminal Code*.

Appearances:
Keith Parkkari
Lynn MacDiarmid

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] Owen Miller stands charged with having committed a sexual assault on C.M. The offence comprises two incidents, one of forced anal intercourse and one of oral sex, occurring on consecutive days in the fall of 2014.

[2] At the time of the alleged offence, Mr. Miller and C.M. worked together. Mr. Miller was C.M.'s boss. She says that the incidents occurred in the fall of 2014 and that she was 17 years old at the time.

[3] The first of the two incidents described occurred following a day of work. Mr. Miller and C.M. were driving around in his vehicle consuming vodka. She describes her

state of intoxication as being a seven or seven and a half out of 10. Mr. Miller eventually dropped her at her grandmother's home where she was living. Her grandmother was away from home for medical reasons. C.M. says that she "crashed out" in her room after she was dropped off. She was asleep when sometime later she says Mr. Miller came into her room and got into bed with her. He took down her pants and anally penetrated her. She says she kept saying no and told him to get off her. He did not desist until, as she describes it, he "finished", at which point he got up and left the home.

[4] The second incident occurred on the following day. C.M. says Mr. Miller came to the home the next morning. They left in Mr. Miller's vehicle, which, she says, ended up in the ditch. They walked from there to Mr. Miller's grandmother's home where, she says, she "had to" perform oral sex on Mr. Miller.

[5] The sole issue to be determined is whether the evidence establishes the guilt of Mr. Miller beyond a reasonable doubt. This essentially turns on the credibility and reliability of C.M.'s testimony.

[6] With respect to the first incident, an assessment of the evidence raises two major questions: whether the incident did in fact occur, and, if it did, does the evidence establish that Mr. Miller was the culprit.

[7] The first question arises as a result of conflicting answers C.M. provided particularly on cross-examination. While she described the incident in direct examination as if she had an actual recollection of the events, albeit limited in detail, when asked whether she was laying on her side, she said that she can't answer that

because she was unconscious. During cross-examination, she conceded that she did not have an actual memory of what had happened. Her first memory was in the morning when she felt that it happened and she felt pain in her anus. At one point she is asked whether she has a clear memory of Mr. Miller being at her home the next morning. It is at this point that she suggests for the first time that her understanding of what happened may have come from Mr. Miller, by making the somewhat confusing statement, “He even told me what he did to me. He said don’t tell anyone, sort of thing, what I did to you, and I kind of just thought in my head that he did something to me”.

[8] The second question arises as a result of the fact that the incident, as first described by C.M., occurred in darkness and the perpetrator said nothing to her during the assault. When asked how she knew that it was Mr. Miller who had assaulted her if she did not see him or hear him say anything, C.M. first says that she had this feeling someone was going “to creep” into the house. When asked how she knew that someone to be Mr. Miller, she says that she had this feeling that it was him based on earlier interactions, though she is unable to describe any earlier interactions which would appear to substantiate her feeling, beyond saying that whenever she was with him, she felt he was going to take advantage of her. When asked if it was possible that it was someone else, her equivocal response is that she does not think so.

[9] When I consider these two questions with respect to the first incident, I must conclude that I am left with a reasonable doubt both with respect to whether the incident occurred as described, and, if it did, whether it can be said that Mr. Miller committed the assault.

[10] Turning to the second incident described by C.M., while her evidence with respect to the incident involving oral sex does not suffer from the same fatal flaws, in particular with respect to identification, that exist with the first incident, there are, nonetheless, a number of frailties with respect to her evidence that must be considered.

[11] Firstly, while her evidence suggests that she was not intoxicated during the second incident, she is unable to provide any appreciable detail with respect to the incident. Her evidence consists basically of her saying that she had to give him a blow job because he told her to. Beyond the additional details of saying he was laying on the pull out couch and she was unclothed, she is unable to articulate how the incident came to pass or how her clothes came to be removed. In particular, she is unable to explain why she “had to”. Indeed, when asked this question on cross-examination, her initial response was, “I’m not answering that”, though she did go on to say that she did not say no because she was scared.

[12] While the minimal detail provided did not result in many major inconsistencies, she did testify to having a cell phone at one point, but then later denied having a cell phone. In addition, she testified that the two incidents were so upsetting to her that she sought the assistance of her aunt shortly thereafter to move to Penticton. Her grandmother was asked if C.M. moved to Penticton, and she suggested that there had been no such move during the time period, though C.M. may have gone to Penticton for a visit with her father.

[13] There are questions with respect to the timing of the incidents as well. The information alleges the offence occurred in September/October of 2014. C.M. said that

they occurred in the fall while her grandmother was away for medical appointments. Her grandmother believes there were some times in September/October of 2014 where she was away, but also noted she was away for medical appointments in January of 2015. In addition, C.M. testified that she was 17 at the time of the incidents in the fall of 2014, but says that her birthdate falls in July of 1996, which would make her 18 years of age.

[14] C.M.'s answers, at times, were completely unresponsive to the question being asked. As an example, on cross-examination, she was asked about an injury suffered by Mr. Miller over the preceding summer, which prevented him from working, to which she answered, "He was the boss. Keith made him that". It is important to note that there were no indicators that she was being deliberately evasive in her answers; rather, it appeared that she had difficulty comprehending some of the questions put to her.

[15] Her evidence, overall, suffered from major deficiencies in memory. She frequently said that she did not know, or could not answer questions put to her. She continually used qualifiers that suggested a lack of confidence in her recollection such as "probably", "maybe", and "I think", and, as already noted, she testified to having recalled things like the first incident of which she later conceded she had no actual memory. She says she does not recall whether she told the police about the second incident, and that she could not answer and was not sure whether she told the police the sexual encounter was consensual.

[16] When asked about her difficulties with memory, she said that is just who she is, although she also agreed that her memory was impacted by frequent consumption of alcohol over the relevant period.

[17] The combined effect of these frailties with respect to C.M.'s evidence is that I am left with serious concern about the reliability of her evidence. This is not to say that C.M. was lying or attempting to mislead the court.

[18] In this case, the manner in which C.M. testified leads me to suspect that the frailties in her evidence are a result of cognitive limitations. There is also reason to think that Mr. Miller took advantage of C.M.'s particular vulnerabilities. However, there is no actual evidence before me that would elevate my suspicions on either point to the level of certainty.

[19] In assessing the strength of the evidence before me, it must be remembered that the standard of proof in a criminal case is beyond a reasonable doubt. Suspicion, even a strong suspicion, is not proof beyond a reasonable doubt. Where there are serious questions about the reliability of the evidence, as in this case, even where there is no reason to believe that a witness is being deliberately untruthful, it is simply unsafe to convict.

[20] Accordingly, I find that the offence has not been proven beyond a reasonable doubt and an acquittal must be entered.

RUDDY C.J.T.C.