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IDENTIFYING INFORMATION HAS BEEN REMOVED

R. v. Nukon, 2003 YKSC 21

Date: 20030326
Docket: S.C. No. 02-00321D
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

HER MAJESTY THE QUEEN

AND:

HARLAN LANCE NUKON

Michael Cozens

For the Crown

Barry Ernewein

For the Defence

**MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH**

[1] VEALE J. (Oral): Harlan Nukon is charged with committing a sexual assault against F.K. on August 16, 2002 and causing bodily harm to her while committing it, contrary to s. 272(1)(c) of the *Criminal Code*.

[2] F.K. was at a drinking party at the residence of her cousin H.T. and K.T., who reside at [. . .] Street in Whitehorse, on the evening of August 15 and the morning of August 16, 2002. Constable Michael Buxton-Carr attended at the residence with Constable Long at 1:16 a.m. on August 16, 2002. They were responding to a noise

disturbance complaint. When they entered the residence there were two people upstairs and two people downstairs. F.K. was downstairs talking peacefully to a female friend. The disturbance came from the upstairs and Constable Long and Constable Buxton-Carr attended H.T. and K.T. who were upstairs.

[3] Constable Buxton-Carr returned downstairs and observed F.K. seated on an armchair quite influenced by alcohol. She is known to Constable Buxton-Carr both in a sober condition and under the influence of alcohol. He described her as speaking slowly and loudly. There was a one-third full bottle of Private Stock wine on the floor beside her.

[4] Constable Buxton-Carr was returning upstairs when he heard someone approach the front door. He identified this person as being Harlan Nukon, who was also under the influence and was swaying from side-to-side with a heavy odor of alcohol. Harlan Nukon advised Constable Buxton-Carr that he lived at the residence. All seemed peaceful and the two women welcomed his presence, according to Constable Buxton-Carr.

[5] The investigation continued upstairs. When Constable Buxton-Carr heard an argument downstairs, he returned to observe Harlan Nukon standing over F.K. having a tug-of-war over a wine bottle. F.K. said, "Leave me alone," and Harlan Nukon backed away and sat on a couch.

[6] The investigation continued upstairs for five to ten minutes and there were no further altercations. When the R.C.M.P. left the house there were five people there.

Constable Buxton-Carr said there was no indication of any black eye or bruising on F.K.'s face.

[7] F.K. is a 47-year-old woman. She is the cousin of H.T. [. . .] She was quite intoxicated the night of August 15, 2002 and the morning of August 16, 2002. She remembers going to H.T.'s with a 15-pack of beer that day. She said that the address was [. . .] Street. She claims she was drinking Extra Old Stock beer and that she had already consumed four beers before she arrived at H.T.'s in the afternoon. She says that H.T., H.T.'s boyfriend K.T., Harlan Nukon, and J. were there when she got there. She had no difficulty identifying Harlan Nukon, as she has known him since he was a boy when they lived in Old Crow. She says that she knows J. well.

[8] She stated that they sat around drinking and H.T. chased J. out as she, apparently, spilled H.T.'s vodka. Then there were only four of them. She stated that K.T. came down from upstairs and locked the door. H.T. and K.T. went upstairs. She then slept on a couch and Harlan Nukon slept on the floor.

[9] F.K. has a recollection of the R.C.M.P. attendance that evening and said that she did not call them. She said they came because somebody called them about a fight upstairs. She said Harlan Nukon was upset with her because he thought that she had called the R.C.M.P. She stated that J. was told to leave before the police came.

[10] She and Harlan Nukon were drinking Extra Old Stock beer until she was tired and passed out, which I assume means that she was sleeping, but not unconscious.

She woke up later and found Harlan on top of her. She said that he gave her a black eye, but she did not actually see him hit her. She said Harlan had his zipper down and she thinks he was trying to make love to her. When she got up, her panties were pulled halfway down. She then went upstairs to sleep with H.T. and waited for Harlan Nukon to wake up.

[11] When she woke up in the morning, she found her panties ripped in half. She says her panties had been fine the previous evening. She also told H.T. what had happened that evening and they met with Harlan Nukon and he, apparently, apologized and asked her not to go to the cops. She claimed he was waiting for a cheque for \$300 and would give her some when the cheque came in. The four of them, and that would be K.T., and H.T., and Harlan Nukon, and F.K. went downtown and drank some more that day.

[12] F.K. did not go to the police station until her daughter took her. She gave a statement to Constable Trudeau on the afternoon of August 16th about 2:00 p.m. At that time Constable Trudeau took a breath sample from her with a roadside-screening test. Her reading was 233 milligrams of alcohol in 100 milliliters of blood.

[13] She was taken to the hospital and seen by Dr. Wintonyk. He confirmed that the bruise on her left eye and shoulder were fresh. I should say, at this point, that there is no question that F.K. had a black and blue left eye that was swollen shut. I have no doubt that she received it after H.T. and K.T. went upstairs to bed. It took three or four weeks to heal. Dr. Wintonyk found no evidence of vaginal trauma. He

confirmed that F.K. told him that she had woken up before any sexual intercourse had occurred.

[14] In cross-examination, F.K. admitted that she had no idea of the times that the events she described occurred. She had no memory of the tug-of-war with Harlan Nukon over her bottle of wine. She had no idea how long she was passed out or what went on in the house during that time.

[15] Her statement that K.T. had locked the door of the house was neither in her statement to the police nor given in evidence by her at the preliminary hearing. She then explained that H.T. told her later that she locked the door.

[16] F.K., apparently, told her daughter that she had been raped, but she never stated this to the police or Dr. Wintonyk.

[17] A number of questions from the preliminary hearing were put to her. She frequently used the words "I think" and "I guess" in giving her evidence. She acknowledged that she does not really remember Harlan Nukon hitting her because she was passed out. She stated that she knew Harlan Nukon inflicted the injuries on her because, "I guess he was fighting me." When pressed by the Crown at the preliminary hearing, she said she remembered it. She also stated at the preliminary hearing that Harlan Nukon tore her panties when she passed out and, "I didn't even know he did it," until she went to the washroom in the morning.

[18] When asked by the Crown at the preliminary hearing whether Harlan Nukon did anything that would make her say he wanted to make love to her she answered, "No, he didn't."

[19] G.N., [. . .] of Harlan Nukon, testified that F.K. came up to him crying while he was getting a drink at the T&M lounge on October 28, 2002. He said she stated that she felt bad because Harlan Nukon, "Never done that to me." G.N. replied, "Why tell me? Tell the cops."

[20] On November 1, 2002, G.N. called Constable Trudeau and left a voice mail message in which he identified himself and said that F.K. wanted to drop the charges and that nothing like that happened. Constable Trudeau never followed up the call and G.N. did not leave a phone number, nor did he call again.

[21] F.K. said that she was drunk all that day; however, she remembers going up to G.N. but not what she said to him.

[22] Both H.T. and K.T. testified, but I find their evidence completely unreliable as neither could even remember the police visit that evening resulting from their noise disturbance. I am, therefore, not satisfied that the door to the house was ever locked that evening.

[23] Under our system of criminal justice it is not enough for me to believe that Harlan Nukon is probably or likely guilty. The Crown is required to prove their case beyond a reasonable doubt. In my view, the only reliable evidence of the events that evening was given by Constable Buxton-Carr. It confirmed that there were five

people in the house when he left. Little is known of the activities of G., the fifth person, who F.K. called J.

[24] There is no doubt in my mind that F.K. had a serious blow to her eye that evening, but I cannot rely on her evidence to prove that Harlan Nukon hit her, nor that he sexually assaulted her.

[25] I am not saying that I disbelieve F.K., but simply that given her poor memory of the events that evening I cannot rely on her evidence.

[26] I am also affected by the statement reported to G.N. and as a result I am left with a reasonable doubt. Harlan Nukon is, therefore, not guilty of the charge under s. 272(1)(c) of the *Criminal Code*.

VEALE J.