Citation: *R.* v. *Pinksen*, 2012 YKTC 44

Date: 20120524
Docket: 11-00410
Registry: Carcross

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

REGINA

v.

DAVID PINKSEN

Appearances:
Ludovic Gouaillier — Counsel for the Crown
Gordon Coffin — Counsel for the Defence

REASONS FOR JUDGMENT

[1] Mr. Pinksen stands charged with committing a sexual assault on S.K. on July 28, 2011. He has entered a not guilty plea.

[2] The matter proceeded to trial in Carcross on March 20, 2012. Crown called three witnesses to testify about the events of July 27 and 28, 2011: the complainant, S.K., her boyfriend, C.S., and Steven Lichacz. Mr. Pinksen testified on his own behalf and called his girlfriend, Kristy Skinner.

[3] The witnesses were relatively consistent in their accounts of what began as a farewell celebration for a co-worker but ended in the charges before me. As is not

surprising, the primary dispute in the evidence concerns the offence itself, leaving me with what is commonly referred to as a ‘he said; she said’ scenario.

The Evidence:

[4] Ms. Skinner and S.K. worked together at a local tourist attraction. As a fellow co-worker was returning to her home in Quebec, plans were made for a going-away party to be held at the cabin Mr. Pinksen shares with Ms. Skinner in Tagish.

[5] In addition to those individuals who testified before me, the party was also attended by the departing co-worker, Andrée-Ann, and her boyfriend, Jeff. They are the only two present from whom I did not hear evidence.

[6] Over the course of the evening, food was barbecued and consumed along with a significant amount of alcohol. The majority of those present engaged in a poker game until approximately midnight. Overall, the atmosphere was lively with much talking and laughing.

[7] There was, however, considerable evidence surrounding comments made by Mr. Pinksen over the course of the evening in relation to the departing co-worker.

[8] S.K. testified that Mr. Pinksen said, “Yeah, I would fuck her; would you fuck her?” S.K. says he was referring to Andrée-Ann who was seated about six feet away from him when the comment was made. Her evidence was that the comments were made loudly and shocked everyone.

[9] C.S. says that Mr. Pinksen told him he would like to have sex with Andrée-Ann and spoke about how good looking she was. C.S. says the comments were made to him outside on the porch when he arrived and repeated when they were seated at the table inside. In his evidence, the comments were made softly and, he did not believe the others would have heard them.

[10] Mr. Lichacz testified that Mr. Pinksen said, “Wouldn’t you do that?” which he interpreted to mean would he have sex with Andrée-Ann, who was seated about 6 feet away. He did not think anyone had heard the comments.

[11] Mr. Pinksen agreed that he did make comments to the effect that Andrée-Ann was good looking. He denies having said that he wanted to have sex with her or “to fuck her”. He further indicated that the comments were joking in nature.

[12] While much was made of these comments, they have little bearing on the offence itself. However, in considering the evidence, there are some conclusions which can be drawn with respect to the witnesses. Firstly, it was evident to me that Mr. Pinksen was downplaying the sexual nature of the comments he made. Conversely, S.K. was exaggerating the volume and impact of those comments. The accounts of C.S. and Mr. Lichacz were clearly the most accurate in this regard, and I find as a fact that Mr. Pinksen made comments to both of them indicating that he would like to have sex with Andrée-Ann, but that such comments were not spoken in an unduly loud voice such that they would have been overheard by everyone present.

[13] Notwithstanding the comments, the party continued. Although C.S. left relatively early due to work commitments the following day, most stayed into the early morning hours. Ultimately, Andrée-Ann and her boyfriend left, followed by Mr. Lichacz, leaving S.K., Mr. Pinksen and Ms. Skinner in the residence. All were intoxicated and continued to drink until Ms. Skinner went up to bed around 6 am. At that point, Mr. Pinksen was on the computer playing computer games, while S.K. was lying on one end of a sectional sofa where she ultimately fell asleep.

[14] It is at this point the evidence dramatically diverges.

[15] S.K. says that when she went to sleep she was wearing tight jeans and a belt, both of which were fastened. She woke up to find Mr. Pinksen kneeling on the floor in front of her. Her pants were around her knees. Mr. Pinksen had one hand up her shirt on her breasts and the other was touching her in the vaginal area. She says that her underwear were still on but were pushed to the side.

[16] She said, “What the fuck” to which he responded that she ‘wanted it’. She left the residence.

[17] Mr. Pinksen denies any sexual contact. He indicates that after playing computer games for a while longer, he lay down on the other end of the sectional and went to sleep. He woke when he heard what he assumed to be S.K.’s vehicle leaving the residence, at which point, he went upstairs to bed and back to sleep.

The Issue and Legal Framework:

[18] The sole issue to be determined in this case is that of credibility. While that sounds simple, in reality, cases which turn solely on an assessment of the credibility of complainant and accused are often the most challenging.

[19] In assessing credibility, I am mindful of the test as set out in the Supreme Court of Canada case of *R*. v. *W. (D.),* [1991] 1 S.C.R. 742, which states that if I believe the accused I must acquit. Even if I do not believe the accused, I must ask myself whether I am, nonetheless, left in reasonable doubt by his testimony. Even if I do not believe his evidence and am not left in reasonable doubt by his evidence, I must ask myself whether, on the basis of the evidence I do accept, I am satisfied beyond a reasonable doubt of the guilt of the accused.

Analysis:

[20] In applying the *W. (D.)* test, the evidence of the accused is not considered in a vacuum. It is necessary, and appropriate to consider the accused's evidence within the context of the evidence as a whole, including the evidence of the complainant. However, it must be clear that this does not involve a comparison of the evidence of the accused with that of the complainant with a view to determining which should be preferred over the other.

[21] Indeed, were it simply a matter of preferring one version over the other, this case would have been significantly easier to decide. Neither party was particularly shaken on cross-examination; and there were only minor problems with the evidence of each. For

instance, both were somewhat contradictory in terms of level of consumption, an all too common circumstance when alcohol is involved.

[22] For S.K., there were two issues requiring consideration. Firstly, there was some question about why she would not have awoken earlier when Mr. Pinksen was removing her admittedly tight jeans, particularly given her evidence that she was curled up on her side.

[23] Secondly, there was a minor contradiction relating to the volume at which she confronted Mr. Pinksen upon awakening. At trial, she characterized it as louder than a regular speaking voice, while in her prior statement to the police, she indicated that she yelled at him. This factor is further complicated by the evidence of Ms. Skinner. The evidence was clear that the residence was a small open concept cabin with the bedroom located in an open loft such that sound would travel throughout. Ms. Skinner testified that she did not hear S.K. yell or speak loudly to Mr. Pinksen as described by S.K. However, she did concede that it would have taken a lot to wake her up at that point.

[24] Both issues relating to S.K.'s evidence may well be explained by the level of consumption of alcohol for both S.K. and Ms. Skinner.

[25] For Mr. Pinksen, I have already noted his minimization of the sexual nature of the comments he made in relation to Andrée-Ann. The only other concern was his response to the question of why he went to sleep on the other end of the sectional with S.K. there instead of going upstairs to sleep. He responded that it is his house and

sometimes he just sleeps wherever he feels like. I found this to be an odd response, but must concede that this issue could equally be explained by his level of consumption of alcohol.

[26] When I consider all of these issues, I find that there is very little basis upon which to reject the evidence of either party. Were this an exercise of preferring the evidence of one over the other, I would not find it difficult to prefer the evidence of S.K. My gut reaction was that her version was most probably what happened.

[27] However, this is not a question of preferring the evidence of one over the other, nor of determining which version is most probably true. I must apply the test as set out in *W. (D.),* and I must be satisfied beyond a reasonable doubt of Mr. Pinksen's guilt before I can convict. It is a very high and exacting standard of proof, and 'most probably' is simply not enough.

Conclusion:

[28] I have struggled considerably with this decision, particularly as I believe S.K.'s version to be most probably true; however, when I apply the *W. (D.)* test, I find that I am simply unable to reject Mr. Pinksen's evidence in its entirety. In the result, I must conclude that I am left in reasonable doubt by his evidence, and I must acquit.

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T.C.J. RUDDY