

Citation: *R. v. Roberts*, 2011 YKTC 09

Date: 20110301
Docket: 10-00002
Registry: Whitehorse
Heard: Pelly Crossing

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Cozens

REGINA

v.

COLIN FRANKLIN ROBERTS

Publication of information that could disclose the identity of the complainant or witness has been prohibited by court order pursuant to section 486.4 of the *Criminal Code*.

Appearances:

Eric Marcoux
Melissa Atkinson

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] COZENS T.C.J. (Oral): Colin Roberts has been charged with two counts of sexual assault involving two complainants, M.S. and N.S. While originally standing trial also on five additional breach counts, he has entered guilty pleas to two of them. I will not deal with any of the breach charges in this decision, solely with the allegations of sexual assault.

[2] Two witnesses testified for the Crown, being M.S. and N.S. M.S. is 20-years of age and N.S. is 19 years of age. There were also admissions, which I will briefly refer to later.

[3] With respect to the evidence of N.S. and M.S., the gist of what is alleged to have occurred was that the two were consuming alcohol together late in the evening of March 10, 2010. Between them they consumed a 26 ounce bottle of vodka. They encountered Mr. Roberts driving his ski-doo and he subsequently took them around for one and a half to two hours and purchased some additional vodka, of which, between the three of them, one half of that was consumed over the next several hours. They ultimately ended up at 4:00 or 5:00 in the morning, after having a stop at Mr. Roberts' cabin, as I understood it, back at the residence of M.S., which she shared with T.J., who was not around. There was no one else at the residence. After spending a little time talking and, at least with respect to N.S., consuming more of the vodka, the parties went to sleep, with Mr. Roberts sleeping on the couch in the living room, and N.S. and M.S. sleeping on the, most likely, double bed in M.S.'s room. The two women were sleeping under separate blankets.

[4] The allegation of sexual assault is that M.S. woke up to find Mr. Roberts having intercourse with her while at the same time having his hands under N.S.'s shirt and fondling her in the breast area. Mr. Roberts is alleged to have stopped shortly after M.S. woke up, and had gone back to sleep on the couch in the living room, while N.S. and M.S. continued to sleep on the bed, albeit under the same blanket at the request of M.S. N.S. testified that she rolled over and went back to sleep after being told by M.S. of what happened. M.S.'s evidence is that she was a little too concerned to go back to sleep, and after closing the door again, observing Mr. Roberts going back to sleep on the couch, she lay on the bed not exactly sleeping. The matter was subsequently reported to the RCMP, but not immediately.

[5] The admissions were that about a week later, M.S. told her mother what happened and she was advised to go to the RCMP, and also that the RCMP attempted to interview several people that were at the residence the morning or during the day of March 11th, however, were only able to obtain a statement from one of these individuals, and this individual, although served with a subpoena, did not show up to testify at trial today.

[6] The evidence of M.S. and N.S. was quite consistent, somewhat remarkably consistent, given their level of intoxication. There were no real inconsistencies between their evidence, and their evidence is uncontradicted by any other evidence. Now, I note that these two witnesses testified that they did talk to each other about what happened in an attempt to try to understand what exactly had occurred that morning. I find that while this may, to some extent, have contributed to their stories being similar, there is absolutely no evidence that there was any collusion in an attempt to mislead the Court or tell the Court a similar story. To the extent that they talked with each other, I find that they did so in a fairly normal matter to try to understand what happened.

[7] Both N.S. and M.S. were admittedly intoxicated, which certainly has the potential to affect their recollection of events that occurred and likely did so to some extent. In particular, I find so with respect to the evidence of N.S., who had a much more limited recollection of certain events, and who said that she continued to drink back at T.J.'s residence, while I note that M.S.'s testimony was that she did not continue to drink. So it is quite likely that N.S. could have been the more intoxicated of the two.

[8] Certainly there is nothing in the evidence that causes any difficulty to the point

that Mr. Roberts is asleep on the couch and N.S. and M.S. are in the bedroom. The critical issue is what happened in the bedroom. I will say I have no difficulty with respect to the testimony of N.S. and M.S. as to what took place afterwards, and how the alleged incident was reported to the RCMP. It was not reported right away, but that does not give me any reason to, in and of itself, doubt the testimony of N.S. or M.S. It is not at all unusual that incidents like this, in communities like this, are not immediately reported, and that does not, in and of itself, have any bearing on the truthfulness of a complainant in many circumstances. Each case will stand on its own with respect to the relevance that may have. In this case, I find it has no discrediting ability with respect to the evidence of M.S.

[9] I found N.S. to be a fairly credible witness as to the events she recalled, recognizing that she has a fairly limited recollection to what did take place, likely, in large part, I would expect, due to her consumption of alcohol and intoxication. To the extent that her evidence was not probative, I find it was more related to the issue of intoxication than anything else; although yet I noticed she was a somewhat reluctant witness, that is it. I did not find her at all to be an untruthful witness.

[10] I found M.S. to be a credible witness. She presented her evidence in what I find to be a very truthful manner. She was not evasive or confrontational. There was nothing in how she testified that gives me any concern that she was doing anything other than trying to tell the truth to the best of her recollection. I find any internal inconsistencies in her evidence to be unremarkable, and not detrimental to an assessment of her credibility. Her actions that she testified to in the bedroom were fairly consistent with an increasing awareness that would naturally follow from someone

becoming more awake, such as getting up and closing the door and stating she saw Mr. Roberts on the couch.

[11] The dream evidence of N.S. and M.S. is a strong coincidence in that what N.S. said she may have been dreaming and what M.S. said she saw with respect to the sexual touching of N.S. by Mr. Roberts is consistent. I, again, am aware of the fact that the two women did have discussions about what occurred in their attempt to understand the events.

[12] I find there is absolutely no evidence to suggest that M.S. attempted in any way to have sex with Mr. Roberts. Although she was crossed on that, there is absolutely nothing in the evidence to substantiate that that occurred.

[13] The standard for conviction is proof beyond a reasonable doubt. This does not require a certainty; that is a threshold that would be too high. It is simply proof beyond any reasonable doubt. Regardless of the extent to which witnesses may be credible and found to be credible, an assessment of the whole of their evidence, in light of all the evidence, must take place to ensure that that evidence is capable of proving a case beyond a reasonable doubt.

[14] I find in this case that there is a very real possibility, perhaps even a very real probability, that the alleged sexual assaults occurred as described by M.S. That said, there is room, however, for reasonable doubt, based upon the intoxication of N.S. and M.S. In the candid testimony of M.S. as to her limited ability to recall exactly what happened, she testified that her memory was somewhat fuzzy, and she was not certain: "I am not really sure what happened." She agreed with that question when it was put to

her by defence counsel. I do find that much of the confusion she testified to was more related to what she felt she should do after that night than it was to what took place, but she certainly was very straightforward in what she could recall and the difficulty she had with respect to what she recalled.

[15] In such circumstances, I find it would be unsafe to convict Mr. Roberts of sexual assault. Therefore, he is acquitted of these charges.

COZENS T.C.J.