

Citation: *R. v. Sidney*, 2007 YKTC 51

Date: 20070719
Docket: 06-11052
Registry: Dawson City
Heard: Dawson City

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Lilles

R e g i n a

v.

Victor Sidney

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:

Lee Kirkpatrick

Counsel for Crown

Malcolm Campbell

Counsel for Defence

REASONS FOR JUDGMENT

Introduction

[1] Victor Sidney, the accused, is a 43-year-old First Nations man who has pled “not guilty” to committing a sexual assault on E. C., an offence contrary to s. 271 of the *Criminal Code*. E.C. is a 25-year-old First Nations woman. She has known the accused for over six years and considered him to be a very close friend. When she was 18 years old and living in Whitehorse, the accused allowed her to stay at his house and helped her get a job. In his evidence, Mr. Sidney said that he helped to look after

Ms. C. Until this alleged incident occurred on July 1, 2006, Ms. C. said that she trusted Mr. Sidney "with her life".

[2] Prior to the date of the charge before the court, Mr. Sidney's house was a favorite "party house" for Ms. C., her friends and others. These parties took place on most weekends. It was not uncommon for people to drink to excess, and to pass out or fall asleep in his bedroom or the spare bedroom. Ms. C. had often stayed in Mr. Sidney's house after a drinking party to sleep off the effects of alcohol, and sometimes during the week when she was working in town, not drinking and needed a place to stay. Ms. C. usually lived with her parents whose home is located at Henderson Corner, about thirty kilometers out of town. It appears that Mr. Sidney also had a close relationship with Ms. C.'s family, as her two brothers also stayed at Mr. Sidney's house on occasion. There was no evidence before the court that suggested that there had ever been a romantic relationship between Ms. C. and Mr. Sidney. Their relationship, as characterized by both of them, was a helping and protective one.

E.C.'s Version of Events

[3] Ms. C. was employed on the George Black ferry. On Friday, June 30, 2006, her friend Rosalee Smarch picked her up after work around ten o'clock in the evening. They went drinking at the bars and closed down the bar at the Midnight Sun Hotel around 2:30 a.m. Ms. C. had consumed 10 to 12 mixed drinks and beer during a four hour period.

[4] Ms. C. and Ms. Smarch had a few more drinks with a man called "Keith" in his room at the Eldorado Hotel. After one half hour, they both left and walked to the accused's residence with the intention of continuing to party. They arrived around 3:30 a.m. A number of people were already there, drinking and partying. They joined the party. Ms. C. does not remember what she was drinking, because she was intoxicated. She remembers calling her friend, Courtney Catty, asking her to call her by telephone later in the day so that she would wake up and get to work on time. She

was feeling really drunk when she lay down to sleep on the bed in Mr. Sidney's bedroom. Rosalee Smarch was lying on the bed beside her when she fell asleep.

[5] Although a fairly larger woman, weighing 185 pounds, there is no doubt that Ms. C. was quite drunk when she retired to the bedroom. By her own account, she may have had as many as 18 alcoholic drinks in a six hour period. Several witnesses referred to her condition as "passed out".

[6] Ms. C. stated that when she went to bed, she was wearing jeans with a zipper. She testified that she woke up before 6:00 a.m. Both her jeans and underpants had been removed. The accused, Mr. Sidney, was on top of her, having penetrated her and was engaged in sexual intercourse with her. She tried to push him off and remembers him saying "No baby, you said it was okay". Mr. Sidney is a much larger man and she was unable to push him away. She repeatedly told him to stop, but he persisted, telling her "Just wait, I'm not done". He did stop, however, when she heard a loud knock on the front door. According to Ms. C., he stopped, got up, pulled on his pants and left the bedroom to answer the front door.

[7] Ms. C. got up and pulled on her pants. She went into the living room and saw Phillip Johnson near the front door and Rosalee Smarch appeared immediately thereafter. She left the house with Ms. Smarch and Mr. Johnson. Mr. Sidney was standing in the kitchen area.

[8] Ms. C. was reasonably confident that they left Mr. Sidney's house around 6:00 a.m., because they went to the Midnight Sun Hotel for breakfast and the restaurant opened at 6:00 a.m. At the restaurant, Ms. Smarch and Mr. Johnson suggested that they go back to Mr. Sidney's house. She would not go with them, and told them what happened.

[9] Later in the morning, Ms. C. telephoned Courtney Cratty to come and pick her up at the Westminster Hotel bar. She told Ms. Cratty what happened, and sought her advice as to what to do. She expressed concern that her boyfriend, Mike, then residing at the Whitehorse Correctional Centre, would get upset with her because he had told her that it was not safe for her to go to Mr. Sidney's home. She was concerned that

Mike would “act up” and lose “good behaviour time” that would otherwise reduce his sentence. She also said that it would be embarrassing to report the incident because she had trusted Mr. Sidney. She did, however, tell Mike what happened and he encouraged her to report the incident. She reported the incident to the police approximately one week later.

Victor Sidney’s Version of Events

[10] Mr. Sidney testified that he had consumed 14 to 15 beer starting at five or six o’clock in the afternoon of June 30, 2006. He said he had been drinking off and on for two days. He admits having sex with Ms. C. around 2:30 a.m. on July 1, 2006. He stated that she was in his bedroom and called him several times while he was in the living room. Finally, he went into the bedroom. He said Ms. C. asked to have sex with him. They both took off their clothes and engaged in sexual intercourse. When Ms. C. experienced an orgasm, she told Mr. Sidney to stop and get off of her. He stated that he just left when she told him to stop, apparently without reaching climax or ejaculating. Mr. Sidney went back out into the living room and passed out at the table.

[11] Mr. Sidney was woken up by Michael Joseph, a neighbour, who had come over complaining that Mr. Sidney’s guests were drinking all of Mr. Sidney’s “booze”. He said that Mr. Johnson, Ms. Smarch and Ms. C. were all sitting around drinking when he woke up. Around 6:30 a.m., they decided to go for breakfast, but he declined saying that “food and booze don’t mix” with him. Mr. Sidney’s sister and Mr. Joseph also remained at the house.

[12] Mr. Sidney was not in Dawson for the latter part of July and most of August. As a result, he was not aware of the charge against him until he returned in September.

[13] Mr. Sidney asserts that Ms. C. consented to have sex with him. He does not assert the defence of mistaken belief in consent.

The Evidence of Other Witnesses

[14] Phillip Johnson, aged 24 years and Rosalee Smarch, aged 25 years, were present at Mr. Sidney’s house on July 1, 2006. Both had been drinking heavily and their

ability to remember details of the evening was limited. Both had difficulty remembering the names of people who may have been present at the party. Mr. Johnson, in particular, had difficulty with both the time and sequence of events. On the other hand, they did have an independent recollection of some of the major events of the evening.

[15] It is apparent that Mr. Johnson and Ms. Smarch were friends of both Mr. Sidney and Ms. C. Ms. Smarch, more than Mr. Johnson, was uncomfortable testifying against Mr. Sidney. Neither had a bias against the accused and both tried their best to recall and to relate what happened on the evening in question. Although both were very intoxicated, I cannot discount their evidence entirely. In particular, I place more weight on their recollections of the more significant events of the evening.

[16] Mr. Johnson came to Mr. Sidney's house around 9:00 p.m. on June 30th and started drinking. Mr. Sidney was also drinking. Mr. Johnson remembered Ms. Smarch and Ms. C. at the party sitting around the table drinking beer. He described his own condition as "buzzed out" and starting to get drunk. He said Mr. Sidney was in the same condition, getting drunk.

[17] When Mr. Johnson left Mr. Sidney's house to get some more beer, he thought around 3:00 a.m., he recalled that Ms. C. was sleeping. After refreshing his memory from the statement he gave the police, he said that Ms. C. was "passed out" when he left. When he returned, he knocked on the front door and walked in. He initially said that Ms. C. was awake and sitting at the table. Ms. C. was visibly upset and wanted to leave right away. He said she was "shaking". On cross-examination he said that he "thought she was sleeping on the couch" when he returned. He also said that he stayed and drank with Ms. C. and Ms. Smarch for awhile before going to the Midnight Sun Hotel for breakfast, around 6:00 a.m. Earlier in his evidence he indicated that they went for breakfast after he returned without any reference to drinking before they left. Mr. Johnson said he could not remember whether he saw Mr. Sidney in the house when he returned.

[18] After breakfast that morning, Ms. C. told Mr. Johnson that Mr. Sidney had sexually assaulted her, providing some details about sleeping and waking up with her pants down.

[19] Rosalee Smarch testified that she picked Ms. C. up at the ferry landing after her shift. They ended up at the Midnight Sun Hotel and stayed there until closing, around 2:30 a.m. She admitted drinking around 13 beer and 15 or 16 drinks in total. She has no recollection of the person named "Keith" as recounted by Ms. C. She and Ms. C. arrived at Mr. Sidney's house between 3:00 and 3:30 a.m. on July 1st. They sat around drinking with other people, although she was unable to recall the names of everyone present.

[20] After one hour, Ms. Smarch and Ms. C. went to Mr. Sidney's bedroom to sleep. She stayed in the bed beside Ms. C. for about fifteen minutes but could not sleep. Her friend Shannon called, apparently to invite Ms. Smarch to her house. She tried to wake Ms. C. up, but was unable to do so. It is significant that she referred to Ms. C. as both sleeping and "passed out", as did Mr. Johnson. Ms. C.'s condition is inconsistent with that described by Mr. Sidney, namely, someone who was awake and who aggressively sought to have sex with Mr. Sidney.

[21] Ms. Smarch left to go to Shannon's house and returned to Mr. Sidney's house between 6:00 and 6:30 a.m. She arrived back the same time as Mr. Johnson. They knocked once, quite loudly, and walked in. Ms. C. was on the couch in the living room, crying. Ms. Smarch asked Ms. C. why she was crying, but Ms. C. merely insisted on leaving Mr. Sidney's house. Ms. Smarch stated that they left to go to the Midnight Sun five to ten minutes after she returned.

[22] Ms. Smarch said that she did not see Mr. Sidney when she returned to the house with Mr. Johnson. He may have been in the bathroom, but he was not in the living room.

[23] After breakfast, Ms. C. told Ms. Smarch that Mr. Sidney had raped her. She was upset and crying when telling Ms. Smarch what happened.

[24] Ms. Smarch confirmed that Mr. Sidney's house was often a party house during weekends. She considered Mr. Sidney a friend. On occasion, she too had slept at Mr. Sidney's house after a drinking party.

[25] Courtney Cratty is the health promotional worker in Dawson, and a close friend of Ms. C. She testified that Ms. C. called her in the early morning for a "wake up call", to ensure that she did not sleep in and miss work. Ms. C. called her again between nine and ten in the morning on July 1, 2006, to pick her up at the Westminster Hotel and give her a ride. To her, Ms. C. did not look well. She had been drinking. When they were in the car, Ms. C. told her that she was sexually assaulted by Mr. Sidney, providing some details. In particular, she was told that the assault was interrupted when Mr. Johnson returned and banged on the door and Mr. Sidney got up to answer the door. Ms. C. also asked her for advice as to what to do. Should she tell her family? Should she go to the police? When and how should she do it? She was also concerned that her boyfriend would be upset if he found out what had happened.

Discussion

[26] In this case, as in many similar cases that come before the court, there are no witnesses to the alleged sexual assault except the complainant and the accused. In this case, Mr. Sidney's version of events is completely different from that of Ms. C. Credibility is therefore a major issue, to be judged by the evidence of Mr. Sidney and Ms. C. and the surrounding evidence of those in attendance at Mr. Sidney's home.

[27] There is a further issue, namely, what weight can be given to the disclosures of the alleged sexual assault to the three individuals – Mr. Johnson, Ms. Smarch and Ms. Cratty? This evidence was led by the crown without objection by the defence. Neither counsel made any submissions as to the relevance of these statements, nor to the weight that should be placed on them.

[28] In my view, the complainants statements to Mr. Johnson, Ms. Smarch and Ms. Cratty are admissible as part of the narrative and as well to rebut the adverse implications of late disclosure raised by the defence during cross-examination. In either case, however, the statements are not admissible for the truth of their contents. They

are admissible to gauge consistency and thus credibility of the complainant's evidence at trial: *R. v. Ay*, (1994) 93 C.C.C. (3d) 456 (B.C.C.A.).

[29] Ms. C.'s demeanor shortly after the alleged assault is consistent with having experienced something traumatic or at the very least, emotionally upsetting. Mr. Johnson described her as "visibly upset" and "shaking" when he returned to the house. Ms. Smarch described her as upset and crying. Ms. Cratty testified that Ms. C. had confided many "bad things" to her, but had never seen her as upset as she was that morning. Mr. Johnson's and Ms. Smarch's observations were made shortly after the alleged incident.

[30] Ms. C.'s evidence at trial was consistent with the evidence of Ms. Smarch and to a lesser extent, with that of Mr. Johnson. Mr. Johnson was very intoxicated. He was uncertain of most of the details of that evening, but was able to confirm Mr. Sidney's state of intoxication, that Ms. C. also was quite intoxicated and that she went to sleep or "passed out" prior to Mr. Johnson leaving the house to get more beer. When Mr. Johnson returned, he reported that Ms. C. was visibly upset and "shaking".

[31] Ms. Smarch's evidence confirmed the arrival at Mr. Sidney's residence between 3:00 and 3:30 a.m. and that she and Ms. C. laid down to sleep in Mr. Sidney's bedroom about one hour later. Mr. Sidney, on the other hand, stated that he had sex with Ms. C. around 2:30 a.m. Ms. Smarch also referred to Ms. C.'s lack of sobriety when she went to bed, referring to her as "passed out".

[32] Mr. Sidney's evidence that he, Ms. Smarch, Ms. C. and Mr. Johnson were sitting around drinking and talking when a decision was made to go for breakfast at the Midnight Sun Hotel is inconsistent with the evidence that Ms. C. was visibly upset, shaking and crying when Mr. Johnson and Ms. Smarch returned to the residence. Although Mr. Johnson did say that he, Ms. Smarch and Ms. C. did have a drink before they went for breakfast, I am satisfied that he was mistaken. In any event, his evidence was that Mr. Sidney was not there at the time and that he did not know where Mr. Sidney was, differed from Mr. Sidney's evidence. Mr. Sidney's assertion that Ms. C. went to the bedroom and repeatedly called out to Mr. Sidney to come into the bedroom

is not supported by any other evidence. It is inconsistent with the evidence of Ms. C.'s state of intoxication and that she went to sleep or passed out. At one point, he described her calling him as "hollering". If that was the case, others would have heard her. There was no evidence that anyone did hear her.

[33] Mr. Sidney's description of Ms. C. seeking sex from him is also inconsistent with their previous relationship. As a much older man, she described him as a good friend who she trusted "with her life". Their previous relationship in Whitehorse was more like a father figure caring for a young woman experiencing difficulties in her life and who had no place to live. I find his assertions that she shouted for him to come into the bedroom and then asked him to have sex with her, lacking in credibility.

[34] Mr. Sidney's description of the sexual encounter, considering his state of intoxication, is less than credible. He said that when Ms. C. experienced an orgasm, she told him to leave, and he did, without experiencing climax himself and without protest.

[35] There is one significant inconsistency between Ms. C.'s evidence and that of Ms. Smarch and Mr. Johnson. Ms. C. said that the sexual assault was interrupted by a loud knock on the front door and that Mr. Sidney got up, pulled on his pants and answered the door. Although she did not directly see who came in, she did see Mr. Johnson and Ms. Smarch in the living room walking from the direction of the door and she assumed that they had entered. Both Ms. Smarch and Mr. Johnson stated that Mr. Sidney did not open the door for them as the door was unlocked and that when they entered, Ms. C. was already in the living room. On the other hand, both were consistent in observing Ms. C.'s condition as upset and crying. It is not possible to resolve this inconsistency on the evidence. Considering the state of intoxication of everyone involved, Ms. C. may be mistaken or Ms. Smarch and Mr. Johnson may be mistaken.

[36] Mr. Sidney has a minor and dated criminal record which I consider to be irrelevant to these proceedings. When he was arrested approximately eight months ago, he was placed on strict release terms. There have been no breaches of his recognizance.

[37] Ms. C. also has a minor criminal record. On the other hand, at the time of the events that resulted in the charge before the court, she was on an undertaking not to consume alcohol and not to attend licensed premises. Clearly, she blatantly disregarded this court order. This is a factor to be considered, along with the other evidence, in assessing her credibility.

Conclusion

[38] In assessing the credibility of Ms. C., I find that her version of the significant events leading up to the alleged sexual assault and subsequent to the event to be consistent with that of the other witnesses, with the exception of how the sexual assault was interrupted. I do not accept Mr. Sidney's evidence that Ms. C. shouted out to him to join her in the bedroom for sex. Ms. C.'s lack of sobriety, described by witnesses as "passed out" was inconsistent with Mr. Sidney's version of events. When weighing the evidence against a yard stick of common sense, Mr. Sidney's version is, in my opinion, highly unlikely.

[39] Mr. Sidney gave his evidence in a matter of fact and unemotional manner. Nevertheless, I found his evidence to be inconsistent with that of the other independent witnesses on several key points.

[40] Ms. C. considered Mr. Sidney to be a close and trusted friend. She had no motive to falsely accuse him of this serious crime.

[41] I do not find the inconsistency between Ms. C.'s evidence and that of Ms. Smarch and Mr. Johnson as to the interruption of the sexual assault to be determinative. As mentioned earlier, any of the witnesses may be mistaken or the actual facts may fall somewhere in between the versions given to the court. Both Mr. Johnson and Ms. Smarch said that they knocked on the front door before entering. Ms. Smarch said it was a loud knock. It could have interrupted the sexual assault. Or the knock on the door may have been closely related in time to the termination of the assault and Ms. C. may have recalled the sequence of events incorrectly, considering her state of intoxication. Importantly, both Ms. Smarch and Mr. Johnson described Ms. C.'s upset condition on returning to the house.

[42] I have considered Ms. C.'s flagrant disregard for court orders. In all of the circumstances, I am not persuaded that this fact alone should lead to the conclusion that she was untruthful in her evidence. In fact, she was very open and forthcoming while testifying about her actions that constituted the breaches of her court order. She was consistent in her evidence both in chief and on cross-examination. Her evidence on all but one matter, the interruption of the sexual assault was consistent in both time and place with the recollection of the other witnesses, excluding Mr. Sidney.

[43] It was suggested by Mr. Sidney that Ms. C.'s upset condition and her allegation of sexual assault was due to the fact that she was concerned that her boyfriend would be upset with her for having consensual sex with Mr. Sidney. I do not accept that explanation. If Ms. C. had not herself disclosed the sexual assault, it is unlikely that her boyfriend would have found out about it. All she needed to do was to keep quiet about it.

[44] Does the evidence prove beyond a reasonable doubt that Mr. Victor John Sidney sexually assaulted E.C.? I am guided by the decision and instructions found in *R. v. W. (D.)*, [1991] 1 S.C.R. 742.

[45] I do not believe the evidence of Mr. Sidney as to the fact of consensual sexual intercourse. Considering all the evidence that I accept, I am not left with a reasonable doubt as to Mr. Sidney's guilt. And finally, I am convinced beyond a reasonable doubt by the evidence that I accept that Mr. Sidney is guilty of the charge before the court.

[46] I would add a further comment. In response to my question whether the defendant was relying on an honest but mistaken belief in consent, the defence response was in the negative. In any event, considering the intoxicated state of Ms. C. and the absence of any steps taken by Mr. Sidney to determine her capacity to consent, that defence would not have been successful.