

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Her Majesty the Queen v. Smarch*, 2003 YKSC 44

Date: 20030826
Docket: S.C. 99-AP008
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Respondent

And:

LLOYD BENEDICT SMARCH

Appellant

Appearances:

David A. McWhinnie
C. Lynn MacDiarmid

Counsel for the Respondent
Counsel for the Appellant

Before: Mr. Justice Veale

REASONS FOR JUDGMENT

Introduction

[1] Lloyd Smarch appeals his conviction of sexual assault on Ms. D., contrary to s. 271 of the *Criminal Code*. His counsel alleges that the trial judge erred in his assessment of the evidence and consequently the verdict was unreasonable.

Issue

[2] The power of this court sitting in appeal is to determine whether the conviction is one that a properly instructed judge acting judicially could reasonably have rendered (*R. v. Yebes*, [1987] 2 S.C.R. 168).

[3] In applying this test, the appellate court must take into account the special position of the trier of fact on matters of credibility. However, as stated, an appellate court can overturn a verdict based on findings of credibility, after considering all the evidence and the special position of the trial judge, when it concludes that the verdict is unreasonable (*R. v. R.W.*, [1992] 2 S.C.R. 122 at 132).

Facts

[4] On April 20, 1998, Lloyd Smarch came to the residence of Ms. D. around midnight. Lloyd Smarch was a 40-year-old man at the time and Ms. D. was much younger, with a young daughter. He was related to Ms. D.'s mother.

[5] Lloyd Smarch had come to her residence before to smoke marijuana, and although she had not expected him, Ms. D. let him in for the purpose of smoking a gram of marijuana that he brought. He brought his bicycle into the hallway.

[6] The facts from midnight to approximately 4:53 a.m. are not in dispute, except for the incident that led Ms. D. to call the police.

[7] They smoked between three and four joints of marijuana. In addition, Mr. Smarch smoked some cigarettes that he rolled while there. They watched television and drank some tea prepared by Ms. D.

[8] At one point Ms. D. spilled an ashtray on the couch she was on. Mr. Smarch says that one of his rolled cigarettes fell out of the ashtray onto the couch. He stated that he had just lit it, but that it would go out on its own.

[9] Ms. D. states that she cleaned up the spilled ashtray. Mr. Smarch says his rolled cigarette remained there under her thigh for about two hours.

[10] Ms. D. then fell asleep. She remembers waking when she felt someone touching her vagina, not in a grabbing sense, but being rubbed by his fingers. She swore at Lloyd Smarch, who was beside her, and kicked him away. She was wearing a T-shirt and large blue shorts over panties. His fingers were between her shorts and her panties.

[11] There had been no discussion of a sexual nature or any romantic interest shown.

[12] Mr. Smarch says that he was watching television and smoking his rolled cigarettes. He was about to roll another one when he remembered the rolled cigarette under Ms. D.'s thigh. He decided to pick it up and in doing so, he touched her thigh but not in a sexual way.

[13] When Ms. D. woke up, she kicked him in the head and he pulled away. She was swearing at him and went to the phone in her kitchen and called the police. During this call, he explained to her that he was picking up his rolled cigarette and that he was sorry. He asked her not to call the police. In court, he explained that there was a warrant for his arrest from an incident and he didn't want to be picked up by the police. He left before the police arrived.

[14] In the typed telephone statement of Ms. D. to the police, there were some inaudible words followed by the words, "I'm making it up. I'm making it up." Ms. D. explained that Mr. Smarch was saying that, but she never said it.

[15] Ms. D. was asked to make a statement to the police on April 24, but she did not do so until April 26, 1998.

[16] Ms. D. said that Mr. Smarch was in slow motion because of the effects of marijuana. She described herself as having a buzz, but feeling tired. Mr. Smarch described himself as "pretty inebriated" and "pretty high".

[17] Both Ms. D. and Mr. Smarch had criminal records, although Mr. Smarch's was more extensive.

Analysis

[18] This is a case where the accused has testified, and the judge must apply, the test set out in *R. v. W.(D.)* (1991), 63 C.C.C. (3d) 397 (S.C.C.) at 409 as follows:

First, if you believe the evidence of the accused, obviously you must acquit.

Secondly, if you do not believe the testimony of the accused, but you are left in reasonable doubt by it, you must acquit.

Thirdly, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[19] The appellant did not submit that the trial judge failed to apply this formula. The trial judge concluded his oral reasons with the following at paragraph 26:

I disbelieve the version of events given by Mr. Smarch. I accept the evidence given by Ms. D. Looking at all the evidence that I accept as a whole, I am not left with a reasonable doubt. I go further and ask whether the explanation given by Mr. Smarch could reasonably be true, and I conclude that it cannot. I find Mr. Smarch guilty of the offence contrary to s. 271.

[20] The trial judge found that Ms. D. did not make up her statement. He also found that he could put no weight on Mr. Smarch saying that he was sorry after the incident. Neither of these findings were mentioned by counsel during the appeal.

[21] Counsel for Mr. Smarch submits that the trial judge erred in concluding that the explanation given by Mr. Smarch could not reasonably be true. She stated that he failed to adequately consider:

1. the fact that both the complainant and Mr. Smarch had consumed three or four joints of marijuana;
2. the explanation that there was a rolled cigarette under the complainant's thigh from the ashtray she had earlier dumped on the couch;
3. the fact that the complainant had been asleep after smoking marijuana and may have been mistaken about the incident.

[22] In response to the first submission, the trial judge clearly addressed this evidence and concluded that both were under the influence of marijuana. He found that the evidence was clear that Mr. Smarch was more under the influence than Ms. D. (para. 15). I have reviewed this evidence and conclude that this finding is reasonable.

[23] As to the existence of the rolled cigarette under Ms. D.'s thigh, the trial judge said this:

Mr. Smarch's explanation that he was reaching for a cigarette, in the context of everything that had happened that early morning, has to be scrutinized carefully. Is that explanation believable in context? I have considered it very carefully and quite frankly I have come to the conclusion that it is not believable. I have already alluded to the fact that his explanation requires me to believe that several hours earlier a lit roly was spilled onto the couch and was not cleaned up by Ms. D., who got up and cleaned the ashes, particularly as Mr. Smarch himself testified that he told her that there was a lit roly and he pointed it out to her. That that roly was not picked up by her or picked up by him at that time is quite incredible. That he would then see this roly under her leg several hours later and want to retrieve it and smoke it also is very difficult to believe. He had not run out of tobacco. He apparently thought, "Why roll another one when that one there is handy." It does not make sense to me for the reasons I indicated earlier.

[24] I find that the trial judge has based his finding on the evidence before him. He simply does not find the evidence of Mr. Smarch credible to the extent that a lit cigarette on a couch is pointed out by Mr. Smarch and then ignored for two hours before he decided to pick it up from under Ms. D.'s thigh while she was sleeping. I can understand that counsel for Mr. Smarch may disagree with the trial judge's conclusion. However, I do not find it unreasonable based on the evidence of Mr. Smarch.

[25] In considering whether the complainant was mistaken given her condition, the trial judge clearly directed his mind to the evidence. He stated at paragraphs 16 and 17:

When Ms. D. was awakened by the touching in her vaginal area, Mr. Chisholm made a point, and it is a valid point, that when a person wakes up they are not necessarily as alert or observant as when they have been awake for some period of time. He also made the point that this obviously happened quickly: she woke up, felt the touching, saw him drawing away, and she then kicked at him.

However, I noted earlier, and I repeat again, that her description of the touching was detailed. This was not a general statement that he was touching her, but rather described that he was stroking her in that area and demonstrated an action with the finger ...

[26] There is one point where the appellant claims the trial judge was being speculative. He said in paragraph 14:

It is not at all clear to me that a roly would be in any condition to smoke after someone had been on it, sitting on it, or laying on it, for two or three hours.

[27] I find that this one line is not based on the evidence, and there is certainly no requirement for Mr. Smarch to establish anything about the condition of the alleged rolled cigarette under Ms. D.'s thigh. However, it is a minor part of extensive oral reasons that covered all the disputed areas of evidence. The trial judge clearly and for

me, convincingly, concluded that Mr. Smarch's evidence on the issue of the lit rolled cigarette, later retrieved from under Ms. D.'s thigh, was not believable for several reasons which were solidly based on the evidence.

[28] Thus, having reviewed all the evidence, I conclude that the trial judge could reasonably have decided that the accused was guilty beyond a reasonable doubt.

[29] The appeal is dismissed.

VEALE J.