

Citation: *R. v. Smith*, 2003 YKTC 51

Publication of information that could disclose the identity of the complainant or witness has been prohibited by court order pursuant to section 486(3) of the *Criminal Code*.

Date: 20030627
Docket: T.C. 02-00626
Registry: Whitehorse
Trial Heard: Carcross

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Chief Judge Lilles

R e g i n a

v.

Ricky Smith

Appearances:
David McWhinnie
Elaine Cairns

Counsel for Crown
Counsel for Defence

REASONS FOR JUDGMENT

Facts:

[1] Mr. Ricky Smith is a young aboriginal man who has been charged with sexual assault, contrary to s. 271 of the *Criminal Code*. The complainant, J.A., lives with H.S., her common-law partner and they have been in a relationship for over two years. The facts surrounding the allegation are not in dispute and can be briefly summarized as follows.

[2] On December 26, 2002, H.S. and J.A. went to Tagish with two friends. They ended up at the residence of Alfred Smith, along with his brother, the

accused, Ricky Smith, and several other people. They were drinking beer and whiskey. It is evident that everyone drank to excess and by the end of the evening, had achieved rather advanced levels of intoxication.

[3] During the evening, there was a physical fight between H.S. and Alfred Smith. H.S. doesn't remember what it was about. Alfred Smith's version was slightly different. He said he intervened in a fight between H.S. and Ricky Smith in order to protect Ricky Smith. H.S. said that after the fight, he went for a walk and returned to the residence and apologized to Alfred Smith. When he returned, H.S. found J.A. passed out in a chair in the living room, fully dressed. H.S. carried her to the spare bedroom and placed her on the bed, covered her with a coat and lay down beside her to sleep.

[4] H.S. described the bed as a single bed that was positioned against a wall. H.S. placed J.A. on the bed beside the wall. No one else was in the room and he closed the door. H.S. fell asleep.

[5] H.S. woke during the night. The bedroom door was open and this allowed light from the living room into the room. J.A. was beside him on her back, her legs apart. J.A.'s pants were off one leg and the accused was on top of her having sex with her. H.S. told Ricky Smith to get out. H.S. later said he, "threw him out", but, I am satisfied no physical force was used. The accused got up, pulled up his pants and left the room.

[6] H.S. said he was certain that the person in the bedroom was the accused, Ricky Smith. H.S. had known Ricky Smith for over five years. There was sufficient light coming from the half open door for H.S. to identify the accused. H.S. saw the accused's face, and I infer from the narrative, that he had a close look, as that person was right beside him on the bed. H.S. was certain that it was Ricky Smith, and not one of the other male persons in the residence. Ricky Smith also had a different body build from the others, and one of the other males in the

house had fairer skin colour. Ricky Smith said something when he left the room, but H.S. could not remember what it was.

[7] According to H.S., J.A. did not wake up during the incident. J.A. was still passed out when H.S. attended to her. H.S. dressed J.A., and lay down beside her to sleep.

[8] H.S. said that he was angry with what happened. His exact words were "I was mad". But, H.S. went back to sleep, rather than seek help or alert the others in the house. On cross-examination, H.S. indicated that there was no phone in the house. H.S. said that he woke up frequently the rest of the night to make sure no one was in the room.

[9] J.A. woke up the next morning and H.S. told her what had happened. J.A. was upset and went out to the living room and confronted the accused. J.A. asked Ricky Smith if he had raped her. H.S. said that Ricky replied, "I was drunk..." and something else that he doesn't remember. J.A. testified that the accused said, "I'm sorry" but not what he was sorry about. H.S. said he fought Ricky Smith for what he did, although, he said it was not really a fight, "I just punched him a couple of times" and then, the accused left the residence.

[10] J.A. and H.S., along with Alfred Smith and two others, stayed at the house for an hour, then went to the road and were able to get a ride into Carcross with an adult they knew. Upon arriving in Carcross, J.A. called her uncle for advice. Apparently on his advice, J.A. called the police. J.A. was taken to the nursing station, but no injuries or bruising were reported or recorded.

[11] Alfred Smith, the accused's brother, also gave evidence. His evidence was not particularly helpful. He was also intoxicated on the night in question. Alfred Smith slept on the couch in the living room and was awakened between 4:00 and 5:00 a.m. by another friend who dropped by and with whom he had

several more drinks. He said he checked on his brother who was sleeping in the bedroom two times that night. He said that the accused was in bed asleep on these occasions.

[12] Ricky Smith did not give evidence.

Conclusion:

[13] Everyone at the party on December 26 and the morning of December 27 was intoxicated, including the main Crown witness, H.S. He said that he was drunk but not overly so. I note that when H.S. returned from his walk and found J.A. passed out in the living room, he had the good sense and physical ability to pick her up and carry her to the spare bedroom and put her to bed by covering her with a coat. When H.S. woke up to discover the accused in the room on top of J.A., he had had several hours of sleep. While intoxicated, I am satisfied that H.S. was capable of observing and remembering what occurred. His actions of dressing J.A. after the incident and covering her up again with the coat indicates a satisfactory level of cognitive and physical abilities.

[14] There is the issue of identification. H.S. had known the accused for many years. When he woke up, the accused was right beside him. There was sufficient light coming through the open door for him to see that it was Ricky Smith. This was not a case of a fleeting glance. It would have taken some time, albeit short, for Ricky Smith to get out of bed, pull up his pants and leave the room. H.S. also stated that the accused spoke before he left the room. All of these circumstances reduce the likelihood of a mistaken identification.

[15] J.A. testified that she was wearing pants called “tear aways” over long johns. They are called “tear aways” because they are fastened along the sides and can be removed without pulling them down and off. H.S. said that when Ricky Smith left the room, J.A.’s one leg was bare. Tear away pants would permit

the leg and private parts of J.A.'s body to be rather easily exposed by undoing the fasteners along the side of the leg and pulling the long johns off one leg.

[16] Defence counsel suggested that as the bed was only a single, it was inconceivable that the incident could have taken place without H.S. waking up sooner. I merely note that everyone, including H.S. and J.A. had consumed a lot of alcohol. Moreover, it is possible that H.S. woke up just as the accused initiated the assault on J.A.

[17] I found the evidence of H.S. to be credible for a number of reasons. For the reasons indicated earlier, I am satisfied that his identification of Ricky Smith was not mistaken. Defence counsel did not press the possibility of a motive to fabricate or concoct the story by H.S. There is no basis to infer that H.S. had any reason to make up such a story. To the contrary, because of the embarrassment and stigma attached to such disclosures, sexual assaults are often not reported to the police.

[18] H.S. has a limited criminal record which indicates a history of alcohol abuse. H.S. was very frank and open in testifying as to his alcohol consumption prior to the incident. There was no suggestion that he had a reputation for untrustworthiness. H.S. gave a coherent account of the events in a manner that did not seem scripted. Events leading up to and subsequent to the incident were corroborated by other witnesses. H.S. provided an appropriate level of detail and was not reluctant to say he could not remember. No inconsistent statements were brought to the attention of the court. H.S.'s conduct in waiting until J.A. woke up in the morning to confront the accused was understandable in the circumstances. The matter was reported to the police promptly, with no undue delay, and statements were given shortly thereafter when memories were fresh.

[19] There was no evidence contradicting the accused. The issues raised by the accused, such as H.S. not waking up earlier considering the small bed on

which H.S. and J.A. were sleeping and the possibility of mistaken identity, do not raise a reasonable doubt.

[20] Considering all of the evidence before the court, I am satisfied beyond a reasonable doubt that the accused assaulted J.A. in the early morning of December 27, 2002. That assault was clearly of a sexual nature. No consent was given as J.A. had passed out and was incapable of giving consent.

[21] Ricky Smith is guilty of the offence contrary to s. 271 of the *Code*.

Lilles C.J.T.C.