Citation*: R. v. S.N.,* 2016 YKTC 39

Date: 20160720
Docket: 15-03549
Registry: Whitehorse

IN THE YOUTH JUSTICE COURT OF YUKON
Before His Honour Judge Luther

REGINA

v.

S.N.

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

Publication of identifying information is prohibited by sections 110(1) and 111 (1) of the *Youth Criminal Justice Act.*

Appearances:
Amy Porteous — Counsel for the Crown
Melissa D. Atkinson — Counsel for the Defence

REASONS FOR JUDGMENT

[1] LUTHER J. (Oral): S.N., as a young person, has been charged on or about August 11, 2015, at Whitehorse, Yukon, did commit a sexual assault on K.A. contrary to s. 271 of the *Criminal Code*.

[2] Back in September 2015, the Crown elected to go summarily and a plea of not guilty was taken on November 19, 2015.

[3] At the time of the alleged offence, S.N. was 17. In fact, August 11 appears to be his birthday. Clearly, he was a young person under the law.

[4] The Crown called two witnesses on July 12, 2016, C.H. and the complainant, after some admissions regarding RCMP involvement.

[5] K.A. and C.H. were very close friends, having met at the pre-course, a brief initiation. They were described as best friends during the time of that particular camp. They have stayed in touch since and have not talked about the case. That is always a difficult situation when you have two people who are close and the case is coming up. They are asked whether or not they talked about the case. Sometimes it seems unrealistic that you would not talk about the case, but my feeling on this one is that they may well have talked about the case, but not in any great detail.

[6] S.N. was known to be gay right from the start of the camp. There were no other gay staff cadets there as they knew it. The military cadet camp had an unwritten policy of do not ask and do not tell, but there did not appear to be any problems with the sexual orientation of the defendant, and certainly none from K.A. and C.H.

[7] It is important to understand the setting. The barracks that they were housed in would have been able to accommodate 34 people to sleep if it were full, but we understand there were 15 to 20 young men there. It is also important to realize with some precision where the bunks were. The complainant was in the first block on the right by himself, and there were four young males across from him. C.H. was in the second block on the right-hand side and the defendant was on the second block from the back on the right-hand side.

[8] In terms of the complaint, K.A. told his best friend at the time of what the defendant had done within six to eight hours of the event.

[9] Getting back to what happened before the event, K.A. returned late from his shift as a cadet sergeant and laid down on his bed. Shortly thereafter, the defendant approached him, asking the whereabouts of his friend J.P. The defendant also was a cadet sergeant and did not outrank K.A. They were both of equal rank.

[10] The defendant, at 6'2" and 195 pounds, was somewhat bigger than the complainant, but not overly so. The defendant laid down beside K.A. on his bed outside the covers around 3 a.m. K.A. said that he just wanted to go to sleep. K.A. did not ask the defendant to leave, nor did he leave himself. K.A. knew that the defendant was a homosexual young man right from the start of the camp. K.A. was a heterosexual young man.

[11] The defendant brought up the game of Awkward, basically where each of them would dare one another with various actions. In K.A.'s words, "make the person feel uncomfortable and the first person to say 'awkward', wins". S.N. put his hand on the hip of the complainant and the complainant felt uncomfortable. He then touched the complainant's penis outside the clothing. At this time, the words "awkward" and "please stop" were mentioned. Lying on their backs, the talking went on for about 10 to 15 minutes, until around 3:30 a.m. — and, of course, it was as dark as it would get on a Yukon August night.

[12] Thereafter, the defendant slid his hand under K.A.'s sweatpants and cupped his testicles. K.A. then indicated that his body froze. He laughed, in my view, somewhat feebly, so apparently as to wake people up.

[13] K.A. claimed that he said, "please stop" and "don't touch." The hand was inside the pants for 5 to 10 minutes. The defendant said, "shhh" and stroked the penis, wherein K.A. did become erect. The defendant then tried to persuade K.A. to go to the bathroom with him and begged him for several minutes to do so, presumably for further sexual activity. The complainant clearly said no to this. The defendant then said, "I'll stop if I can give you a blow job for 30 seconds." The defendant removed K.A.'s sweatpants and the act of fellatio took place for about 10 seconds. There was no ejaculation, and the defendant said, "don't tell anyone." Altogether, the defendant was on the bed with him for about an hour and, at the end of it, there was a pinky promise not to tell.

[14] We did not hear from the defendant as to his version. We are basically counting on the evidence of K.A., who I thought was forthright and mostly honest about what happened. At the time of the event and the contemplation of what to do, he must have been heavily conflicted because he did not want to get anybody in trouble, but then, on the other hand, he felt used and probably somewhat ashamed or guilty for having permitted things to go as far as they did.

[15] The Court, even though it is not a he said/he said situation, nonetheless, has to make findings of credibility. The B.C. Court of Appeal has, as recently as 2012, if not subsequent to that, in the case of *R. v. Sandhu*, 2012 BCCA 500, referenced a case of

Faryna v. Chorny, [1952] 2 D.L.R. 354, (B.C.C.A.), which was a B.C. Court of Appeal decision, a civil case, from 1952, almost 40 years before the Supreme Court of Canada decision in *R. v. W.(D.)*, [1991] 1 S.C.R. 742. In *Faryna v. Chorny* the B.C. Court of Appeal said:

> ...In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

Those cases are important.

[16] In terms of reasonable doubt, the Supreme Court of Canada has been very helpful to us trial judges in developing the law as they have done. We have *R. v. Lifchus*, [1997] 3 S.C.R. 320, *R. v. Starr*, 2000 SCC 40, and then *R. v. J.M.H.*, 2011 SCC 45, and we know full well that the Crown has to prove the case beyond a reasonable doubt.

[17] In terms of these types of cases, the Supreme Court of Canada has been helpful also — and I am referring in particular to the case of *R. v. Ewanchuk*, [1999] 1 S.C.R. 330. In that case, the victim was kept in a confined space and it was only she who testified. The Supreme Court held that the accused's perception of her state of mind is not important, nor relevant. What is important is whether or not the trial judge believes, and in this particular case whether I believe, that K.A. subjectively did not consent. The consent must be given freely, in the absence of fear and fraud.

[18] We have some guidance from Parliament in these sections as well. One of the guiding sections in the *Code* is s. 265(3)(b) :

> ...no consent is obtained where the complainant submits or does not resist by reason of
>
> (b) threats or fear of the applicant of force to the complainant or to a person other than the complainant.

That section also talks about fraud and the exercise of authority and possible force to other people other than the complainant.

[19] The direction from *Ewanchuk* is of considerable assistance. The evidence must show that the defendant believed that K.A. had communicated consent and, furthermore, that the consent means that K.A., in his mind, wanted the sexual touching to take place. A belief that silence, passivity, or ambiguous conduct constitutes consent is a mistake of law and provides no defence and, furthermore, the defendant's belief cannot be reckless, wilfully blind, or tainted. The defendant must point to some evidence from which he could honestly believe that consent to have been re-established that is in the event of an initial no, followed by further activity. In the *Ewanchuk* case, it was clear that the complainant, in the confined space, said "no" three times and, as the Supreme Court ruled, her expression has an enforceable legal effect.

[20] In asking the question, "Did the defendant honestly believe that K.A. communicated consent?", we have to go to a detailed analysis of the facts of the case and, furthermore, ask the question, "Is there an air of reality to this defence of honest mistake?" More than neutral conduct is required. The defendant must believe that the actions or words that K.A. said were "Yes."

[21] K.A. was not a rookie cadet. He was an experienced cadet and he was clearly foolish to have allowed S.N. to lie down with him on his bunk at that hour, even though

apparently it was not uncommon for some cadets to do that sporadically. By that I mean that they would sometimes lie on one another's beds and just chat, shoot the breeze, pass the time of day, with no sexual overtones.

[22] K.A. knew right from the start of the camp that S.N. was gay and it was a wrong decision for him to have allowed him to lie down on his bed with him at that hour and at that time, and that would also apply to any cadet who allowed any person who might be sexually attracted to them, male or female, to lie down at that time under those circumstances.

[23] K.A. was foolish to have allowed the defendant to persuade him to play the game Awkward. The facts show that they did embark on this game even though the complainant was somewhat nervous and apprehensive about it at the outset.

[24] K.A. was foolish to have allowed the defendant to touch his hip and then his genitals outside of his clothing, even though the complainant had indicated that he and some boys had occasionally done that sort of thing in a limited fashion before, certainly not on a frequent basis, but it had happened before. One might put this off to sexual experimentation.

[25] Furthermore, K.A. was foolish to have allowed S.N. to have touched his penis inside his clothing. But we did hear from the evidence that at that point, around about that time, that K.A. was not worried.

[26] In a thorough review of the evidence, it is my view that there was consent up to this point by the actions of the complainant and by him participating in the game and,

indeed, saying the word "awkward" a couple of times at least, and lying there talking so freely for an extended period of time. But things changed. When the defendant whispered about going to the bathroom for further sexual activity, K.A., who had already frozen somewhat in terms of his response, was clearly no longer consenting and said, "No, I am not going anywhere with you."

[27] Throughout this whole time, the defendant was the aggressor and had persuaded K.A. to participate up to the point of touching his penis. K.A. was undoubtedly tired from his late shift and was not thinking straight. By playing Awkward and saying it a few times, he did give consent by words and his talking generally and by his staying there to sexual touching, but the consent ceased at that point. In my opinion, there was an indirect threat implied when the defendant said, "I'll stop if I can give you a blow job for 30 seconds." It was at this point that the consent clearly stopped.

[28] In my opinion, K.A. did not consent, he was already in a frozen state, and the defendant was able to remove his pants and perform fellatio on K.A. for 10 seconds, considerably less than the time of 30 seconds that was discussed. There was no ejaculation. The defendant got the message that there would be no bathroom sexual adventure and that is why he persisted with the conditional demand for the act of fellatio on K.A. The defendant, in his persistence, was wilfully blind as to consent after he had touched the penis of K.A. There was no consent for this act of fellatio and, on that basis, the Court is finding this young man guilty of sexual assault, contrary to s. 271. That is the ruling of the Court.

[SUBMISSIONS RE DATE FOR SENTENCING]

[29] THE COURT: There is one thing as I was going through my notes — and I think you can appreciate that we just did this case last week and I have been very, very busy since then — I did not want the judgment to appear to be disjointed, but there was one other point that I wanted to make and I will make it at this time as well, and that is in talking about the credibility of the complainant.

[30] I started to say that he was forthright and mostly honest about what happened, but that at the time of the event and the contemplation of what to do, he must have been heavily conflicted, felt used, and probably somewhat ashamed or guilty of having permitted these things to go so far as they did. Then I meant to say this: He did not appear to be angry or embarrassed in court. There was some conflicting evidence on four main points, and I want to talk about those briefly, and that is the points between the two friends, C.H. and K.A.

[31] The location of where they first talked about this, that does not impact on the credibility of the complainant; neither does the role of counsellor M.; neither does whether or not the defendant stood up in terms of removing the sweatpants; and neither does K.A. appearing upset or angry, as opposed to quiet and depressed. The fact is that there was confusion in his mind at the time. He probably experienced all of those emotions, upset, angry, quiet and depressed, all in the same day when he was making the disclosures to his friend, and they do not impact on the specifics of the sexual assault that were given by the complainant (*R. v. Dayes*, 2013 ONCA 614 at paragraphs 51- 56).

[32] This matter, then, is adjourned until 19 August, at 1 p.m., with an undertaking from Ms. Atkinson that she will bring it forward if she is able to.

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LUTHER, T.C.J.