

Citation: *R. v. Stark*, 2006 YKTC 107

Date: 20060818
Docket: T.C. 05-00510
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Faulkner

REGINA

v.

RICHARD DANIEL STARK

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

Appearances:
Michael Cozens
Edward Horembala, Q.C.

Counsel for Crown
Counsel for Defence

REASONS FOR JUDGMENT

[1] FAULKNER C.J.T.C. (Oral): Richard Daniel Stark is charged with sexually assaulting T.R. on the 30th of September 2005. Mr. R., a young man of 20, was a co-worker of Mr. Stark's at Raven Recycling, and through their mutual work they had become friends and ultimately Mr. R. had rented the basement suite in Mr. Stark's residence. Mr. R. says that he was at home on the 30th of September, when Mr. Stark came into his suite and first exposed himself to Mr. R., and then sexually assaulted him by grabbing his penis.

[2] In my view, Mr. R. was generally a credible witness. He gave his evidence quite carefully, and, despite Mr. Horembala's able cross-examination, in my view, what he said on the stand was pretty clearly consistent in all material respects with what he earlier told to the police. It is true that Mr. R.'s description of the events as reported by his mother and aunt and Mr. Schalko are arguably different, but in my view, it would be unfair to compare these reports of what Mr. R. said to his evidence and to his police statement because, of course, these statements were not taken down and recorded. In the case, for example, of the aunt, she indicated that what she was telling the police was an amalgam of what she had heard from Mr. R. and his mother. So the shifting of sequence of events and so on reported by these people does not particularly cause me any great concern.

[3] I also note that Mr. R.'s demeanour and actions afterwards were, in my view, entirely consistent with something very untoward having happened. He seemed to want nothing more than to get away from Mr. Stark's house and he was acting strange at work.

[4] Mr. Horembala made much of what Mr. R. did or did not do when he says that Mr. Stark assaulted him. In my view, Mr. R.'s description of his shock and inaction actually was quite credible. I think if one was making up a story of this kind, one would be more likely to claim to have made a more robust defence.

[5] It was suggested in argument for the first time, certainly not in cross-examination, that Mr. R. had somehow made all this up, I suppose to deflect suspicion that he might be involved in this break and enter at Raven Recycling. This to me seemed somewhat

farfetched. I think one has to look at the fact that Mr. R. considered the Starks as friends and benefactors, and it simply seems to me unlikely that he would invent a story of this kind out of whole cloth against the off chance that he might somehow be implicated in this breaking and entering.

[6] So without labouring the point, I do find Mr. R. to be a credible witness.

[7] That, of course, is not the end of the matter, because even if I believe the complainant's evidence, that does not equal guilt of the accused. In order to convict, I must, in a case such as this where the accused has testified and called a defence, completely reject that evidence or, in other words, find that there is no real possibility that the defence evidence would be true.

[8] Mr. Stark's evidence, very shortly put, is that he denies sexually assaulting Mr. R. and says that the blow-up between himself and Mr. R. occurred because Mr. R. became upset after Mr. Stark suggested to Mr. R. that he might have been involved in a break and enter that had happened some considerable time previously at the Raven Recycling Center. This story, in my view, has to be viewed with some suspicion for a number of reasons, not the least of which being that the accused apparently did nothing with this apparently important information that Mr. R. passed on of having seen the safe and so on.

[9] However, I am faced with this, and that is, if this story is a concoction, it is far from a recent one. It was, in fact, virtually an instant concoction, because the accused had the presence of mind to think it up in the time it took him to make his way from Mr. R.'s apartment to his own bedroom. Whether he went directly from A to B is not the

point, but clearly it would have been done quite quickly. Given, as I say, that he was telling this story virtually immediately after the incident in question, I find it impossible to exclude the possibility that what he says may have some credit to it.

[10] At the end of the day there is some doubt left in my mind by the defendant's evidence and he is of course entitled to the benefit of that doubt. The charge is dismissed.

FAULKNER C.J.T.C.